

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al.,	}	Docket No. 10 C 5711
Plaintiffs,		
vs.		
PACKAGING CORPORATION OF AMERICA, et al.,		Chicago, Illinois May 31, 2012 10:00 o'clock a.m.
Defendants.	}	

TRANSCRIPT OF PROCEEDINGS - RULE 16 CONFERENCE  
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN

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10:05:54 1 (The following proceedings were had in open court:)

10:05:54 2 THE CLERK: 10 C 5711, Kleen Products v. Packaging  
10:16:18 3 Corporation.

10:16:20 4 THE COURT: Good morning. This is our second day of  
10:16:26 5 experimentation here. We are on the record in the courtroom  
10:16:32 6 of the Kleen matter, and today's Rule 16 conference is with  
10:16:40 7 the plaintiffs Kleen Products, and this particular defendant  
10:16:46 8 that we are meeting with is International Paper.

10:16:48 9 I want to -- I am sure you probably all got a  
10:16:56 10 breakdown from yesterday, and I am hoping today -- I want to  
10:17:04 11 say I thought that I could have done a better job yesterday.  
10:17:10 12 Even though I was very prepared on paper, what I am realizing  
10:17:16 13 is there are plenty of rules on how to do pretrial discovery  
10:17:20 14 the old way; but this new method, there are no rules on how we  
10:17:26 15 do this. And it was a little ramblly yesterday, particularly  
10:17:32 16 in the beginning, so I kind of regrouped last night, and I'd  
10:17:36 17 like to try something a little bit different this morning.

10:17:40 18 So I actually would like to -- and this is also very  
10:17:50 19 important and why I am so glad you are here, our company  
10:17:54 20 person, is because I have been committed to giving each  
10:17:58 21 defendant an individualized treatment, which for a court is  
10:18:04 22 very hard to do in a multiparty case, and I think here more  
10:18:10 23 than ever, it's important in the pretrial stage because  
10:18:14 24 everyone keeps the material in such an individualized way.  
10:18:20 25 You seem to be -- if I had to say, it seems like you're the

10:18:22 1 largest of all of the defendants.

10:18:28 2 MR. McKEOWN: That's right.

10:18:28 3 THE COURT: And it must be hard for you to manage,  
10:18:30 4 and it's hard for --

10:18:32 5 MS. BULA: It's a challenge.

10:18:34 6 THE COURT: -- me to manage. Yes, right.

10:18:36 7 So that being said, I thought -- I have a bullet  
10:18:40 8 point agenda, but, actually, I would like to ask one lawyer  
10:18:48 9 for each side, Mr. McKeown, we will start with you, what are  
10:18:54 10 three things you hope to accomplish?

10:18:56 11 We have probably until 1:00 o'clock. I wanted to say  
10:19:04 12 how long we are going to work because we are going to start  
10:19:04 13 at 2:00 o'clock with Georgia-Pacific. So I thought what we  
10:19:08 14 would do today, where we got off so far is on the request to  
10:19:12 15 produce documents, and that issue is so complicated, both  
10:19:18 16 legally and factually, that I would like to put that until the  
10:19:22 17 end of what we are going to talk about today because I want to  
10:19:28 18 hear from you about it. But it's going to really be one we  
10:19:34 19 are going to have to -- it's going to be a work in progress.

10:19:38 20 So when you were getting ready for today, what are  
10:19:40 21 three things IP would like to accomplish today?

10:19:50 22 MR. McKEOWN: Well, I think the most pressing for us  
10:19:52 23 in terms of time is International Paper is under court order  
10:19:56 24 from the District of Columbia to divest three mills as part of  
10:20:04 25 the consent decree reached with the Department of Justice

10:20:06 1 antitrust division in connection with the Temple-Inland  
10:20:08 2 acquisition that occurred several months ago. That  
10:20:14 3 divestiture is likely to happen in the next 30 days or so.

10:20:20 4 We have had preliminary discussions with the  
10:20:22 5 plaintiffs about trying to reach some type of agreement on  
10:20:26 6 preservation as these mills are being divested. We can set  
10:20:32 7 aside for that part, you know, what's actually going to be  
10:20:36 8 produced out of those because we have some different views  
10:20:38 9 about where mills are in this whole scheme, but we would like  
10:20:42 10 to reach agreement so that there is no question after, in  
10:20:48 11 compliance of another court order, we divest the mills that we  
10:20:52 12 did not keep something that we needed to keep.

10:20:54 13 THE COURT: So that is an issue that is completely  
10:20:58 14 related only to IP, maybe Temple, and not any of the other --  
10:21:04 15 not any of the other defendants.

10:21:06 16 MR. McKEOWN: Correct. It's just IP and Temple.

10:21:12 17 THE COURT: And it's not a common issue to the other  
10:21:12 18 defendants. Okay.

10:21:12 19 And that sounds like that needs some special work,  
10:21:18 20 whether it be today or with you on that particular issue.

10:21:18 21 MR. McKEOWN: Correct. And we've given a proposal --

10:21:24 22 THE COURT: And fairly imminent we've got to come to  
10:21:28 23 something. Good.

10:21:28 24 Number two. It's almost like you knew what I was  
10:21:30 25 going to ask you.

10:21:32 1 MR. McKEOWN: I did not.

10:21:32 2 THE COURT: What's number two?

10:21:34 3 MR. McKEOWN: Number two, and this may be two and  
10:21:36 4 three combined, is that we would like to find a way to wrap up  
10:21:46 5 as many of these issues as we can in some type of negotiated  
10:21:52 6 resolution, whether we -- you know, if we knew providing --  
10:21:56 7 and we can talk about this in a bit, I think we are now up to  
10:22:00 8 47 individuals who are custodians at some level or another.  
10:22:04 9 And if we knew that providing a few more custodians or, you  
10:22:10 10 know, taking it back one year on conduct, if we had some  
10:22:12 11 package to get this resolved, we would really like to find  
10:22:16 12 some way to move forward, and as I think is probably true for  
10:22:20 13 all the defendants, and have the plaintiffs satisfied to the  
10:22:26 14 extent that any party is ever satisfied with the other's  
10:22:30 15 production and get into the next phase of the litigation.  
10:22:34 16 And, you know, whether that goes to the custodian issue, you  
10:22:38 17 know, any of the other issues that we are talking about, it's  
10:22:42 18 all wrapped together for us.

10:22:44 19 THE COURT: Okay. Good. That's great.

10:22:48 20 Are you going to tell us, Mr. Sprung, on behalf of  
10:22:52 21 your folks?

10:22:54 22 MR. SPRUNG: Yes, I'd love to. Thank you.

10:22:56 23 THE COURT: Because you have been zeroing in on  
10:22:58 24 International Paper, so what do you think are the three  
10:23:02 25 pressing things that you hope to talk about today?

10:23:06 1 MR. SPRUNG: Okay. The first would be the disclosure  
10:23:12 2 to plaintiffs of recipients of litigation holds.  
10:23:16 3 THE COURT: The names?  
10:23:20 4 MR. SPRUNG: Yes.  
10:23:20 5 THE COURT: Not the hold itself.  
10:23:22 6 MR. SPRUNG: That's right.  
10:23:24 7 THE COURT: Okay.  
10:23:24 8 MR. SPRUNG: Names and I think dates of receipt of  
10:23:30 9 the litigation hold.  
10:23:30 10 THE COURT: All right.  
10:23:32 11 MR. SPRUNG: The second would be custodians, to talk  
10:23:38 12 about our differences --  
10:23:38 13 THE COURT: Okay.  
10:23:40 14 MR. SPRUNG: -- as to who are proper custodians.  
10:23:42 15 THE COURT: Right.  
10:23:42 16 MR. SPRUNG: And third would be talk about our  
10:23:46 17 differences with regard to the source of documents that IP is  
10:23:52 18 searching to produce documents to us.  
10:24:00 19 THE COURT: Can you give me an example?  
10:24:02 20 MR. SPRUNG: Dan has referred to it as the corpus  
10:24:04 21 issue, but I can give you an example, your Honor.  
10:24:06 22 THE COURT: Okay.  
10:24:08 23 MR. SPRUNG: There is an exchange server which is  
10:24:12 24 centrally located. And then at each mill, there's a server  
10:24:20 25 that contains documents. The exchange server contains emails.

10:24:26 1 The server at each mill is called a My Docs server and it  
10:24:32 2 contains, say, Word documents, PowerPoints, Excel  
10:24:38 3 spreadsheets, reports.

10:24:40 4 So there are areas in which IP and plaintiffs agree  
10:24:44 5 with regard to whether they should produce a particular source  
10:24:48 6 of -- documents from a particular source or search for  
10:24:54 7 documents within that source for a particular custodian. And  
10:24:58 8 then there are areas where we disagree, where we want them to  
10:25:02 9 search more of the sources, and I have a chart that is going  
10:25:08 10 to explain this. If I may share that with Mr. McKeown and his  
10:25:16 11 colleagues.

10:25:18 12 THE COURT: Do you have a second one?

10:25:20 13 MR. SPRUNG: I do. I have a whole stack of them.

10:25:22 14 THE COURT: Thank you.

10:25:28 15 MR. SPRUNG: And what this is, you know, fortunately,  
10:25:32 16 we anticipated a little bit your desire, because we shared  
10:25:36 17 also, to try to identify some concrete issues. There are  
10:25:40 18 issues on which we agree, and then there's some concrete  
10:25:44 19 issues on which we just haven't been able to reach agreement,  
10:25:48 20 and hopefully you can provide us guidance on those, your  
10:25:52 21 Honor. But we have prepared for those three issues and also  
10:25:58 22 for the mill divestiture issue that Mr. McKeown raised, and we  
10:26:02 23 prepared this to help your Honor understand --

10:26:08 24 THE COURT: On this third issue.

10:26:10 25 MR. SPRUNG: This is actually on all three of these



10:26:12 1 issues. And it actually contains a little bit more about the  
10:26:16 2 RFP. There are some slides on the RFP issues which we are not  
10:26:24 3 anticipating necessarily getting addressed today, but if we  
10:26:26 4 can get to it, that would be great.

10:26:28 5 And so with your permission, your Honor, I'd like to  
10:26:34 6 just walk you through what this is --

10:26:36 7 THE COURT: Sure.

10:26:38 8 MR. SPRUNG: -- and how we can cover the various  
10:26:40 9 issues the parties have raised.

10:26:42 10 The first slide is intended to -- first, it sets out  
10:26:48 11 what our understanding of their retention policy for email  
10:26:52 12 that IP has. And what it sets out, your Honor, is that  
10:27:00 13 because of the retention and deletion policy that IP has,  
10:27:04 14 there are very few emails that have been preserved when one  
10:27:10 15 goes back a number of years. And I actually have a count of  
10:27:18 16 the emails. And I apologize, I didn't print out additional  
10:27:22 17 copies, but I am happy to just circulate that.

10:27:26 18 THE COURT: Sure.

10:27:26 19 MR. SPRUNG: That shows from the most recent  
10:27:28 20 production when one looks at the number of emails that have  
10:27:30 21 been produced --

10:27:32 22 THE COURT: Total?

10:27:32 23 MR. SPRUNG: Total number of emails in the most  
10:27:34 24 recent production. You can see that there are maybe 180 from  
10:27:38 25 2004 and 10,000 or some, 30,000 or something like that, from

10:27:44 1 2010.

10:27:44 2 THE COURT: Of all of the custodians?

10:27:50 3 MR. SPRUNG: Of those custodians, yes, their named  
10:27:52 4 custodians. We are still dickering over additional  
10:27:56 5 custodians; but, yes, all the custodians.

10:27:56 6 MR. McKEOWN: The 26 named custodians for whom we  
10:27:58 7 have originally produced. I'm assuming that's the production  
10:28:00 8 you are talking about.

10:28:00 9 MR. SPRUNG: That's right.

10:28:02 10 MR. McKEOWN: Because there are some more people in  
10:28:04 11 the next production.

10:28:04 12 THE COURT: Now, this is very interesting, though, on  
10:28:06 13 a specific issue because their policy is certainly different  
10:28:10 14 than the people we talked to yesterday.

10:28:14 15 MR. SPRUNG: Okay. So this lays out why we're seeing  
10:28:20 16 what we're seeing, which is very few emails from relatively --  
10:28:24 17 from the earlier period, more emails from 2010. This slide  
10:28:30 18 right here explains why that is, and we're setting this out  
10:28:34 19 not to put IP in an embarrassing spotlight --

10:28:38 20 THE COURT: Right.

10:28:38 21 MR. SPRUNG: -- but to explain why it is that we want  
10:28:42 22 other sources searched so thoroughly, because they have a very  
10:28:50 23 aggressive email deletion or email -- you know, a policy  
10:28:58 24 for --

10:28:58 25 THE COURT: All right. So this comes from the main

10:29:00 1 server; is that what you're saying? Or let me ask you. So in  
10:29:08 2 your first production to them, did that come from many places?

10:29:14 3 MR. McKEOWN: I'm assuming this came from the April  
10:29:18 4 production.

10:29:18 5 MR. SPRUNG: April 18th, I think it was.

10:29:20 6 MR. McKEOWN: Right, which would have been the --  
10:29:24 7 prior to that had been the hard copy documents for those 26  
10:29:28 8 named custodians.

10:29:28 9 THE COURT: Okay.

10:29:28 10 MR. McKEOWN: This would have been the ESI, so there  
10:29:32 11 would have been Word documents in there, PowerPoints, Excel  
10:29:36 12 spreadsheets, and it would have also contained emails for  
10:29:40 13 those individuals to the extent responsive.

10:29:42 14 MR. SPRUNG: And the emails would be from --

10:29:44 15 THE COURT: See, where I'm confused on your term  
10:29:46 16 "sources of information," I didn't know if you meant different  
10:29:50 17 kinds of servers or different kinds of material. I am just  
10:29:56 18 confused on your sources of information.

10:29:58 19 MR. MOGIN: If I may. Sure. If I may, your Honor.  
10:30:00 20 Most of -- usually in this case up to this point when we have  
10:30:06 21 been talking about sources of information other than, quote,  
10:30:10 22 main active servers or active data, we have focused on backup  
10:30:14 23 tapes.

10:30:16 24 THE COURT: Right.

10:30:16 25 MR. MOGIN: But there are other sources as well:

10:30:18 1 laptops come to mind, thumb drives, things of that nature,  
10:30:24 2 something that might be offline in the cloud. Who knows? But  
10:30:30 3 what I would like to highlight to you why this is of  
10:30:34 4 particular importance with respect to IP is that if you look  
10:30:38 5 at the demonstrative at the very bottom of the page we were  
10:30:40 6 looking at, there is the red box, and the red box says we've  
10:30:46 7 got no backup tapes from IP. So backup tapes aren't really an  
10:30:56 8 issue.

10:30:56 9 THE COURT: So other sources here --

10:30:58 10 MR. MOGIN: Exactly.

10:31:00 11 THE COURT: -- potentially.

10:31:02 12 But let me just ask them right now.

10:31:04 13 MR. SPRUNG: Yes.

10:31:06 14 THE COURT: So is this aggressive email policy, we  
10:31:08 15 are calling it aggressive because it's aggressive here --

10:31:10 16 MR. McKEOWN: I wouldn't actually call it aggressive;  
10:31:14 17 but, yes.

10:31:14 18 THE COURT: But your email deletion policy, was that  
10:31:16 19 only to the main server, or is it also the same for laptops,  
10:31:20 20 thumb drives, da de da de da?

10:31:24 21 MR. McKEOWN: Well, the emails are all on one server  
10:31:28 22 in Memphis, regardless of where the employees are based. The  
10:31:32 23 email policy would have been -- the delete policy would have  
10:31:36 24 been suspended for legal hold, for those on legal hold, and  
10:31:44 25 the --

10:31:44 1 THE COURT: You mean in other cases too or just  
10:31:46 2 this --

10:31:48 3 MR. McKEOWN: In other cases as well.

10:31:50 4 THE COURT: In other cases too. Okay.

10:31:50 5 MR. McKEOWN: So, for example, when we pulled a  
10:31:52 6 custodian's documents, if that person was previously on legal  
10:31:58 7 hold in another case, those documents were also swept into  
10:32:02 8 what was available to be captured here.

10:32:06 9 THE COURT: Okay.

10:32:06 10 MR. MOGIN: So a couple of things on that, your  
10:32:08 11 Honor. If you will flip to page 5.

10:32:14 12 THE COURT: This is page 2.

10:32:16 13 MR. SPRUNG: Yes.

10:32:20 14 MR. FREED: They start getting numbered.

10:32:22 15 MR. SPRUNG: There are numbers in the lower  
10:32:26 16 right-hand corner.

10:32:26 17 MR. MOGIN: If you look on the left-hand column,  
10:32:30 18 those are sources.

10:32:32 19 THE COURT: Okay.

10:32:32 20 MR. SPRUNG: So we will -- your Honor, we will get to  
10:32:36 21 walking through the sources with you. But to answer the  
10:32:42 22 specific question you just posed, this aggressive -- what we  
10:32:48 23 call an aggressive, whatever the --

10:32:50 24 THE COURT: We will just call it email policy.

10:32:54 25 MR. SPRUNG: Email management policy is what they

10:32:56 1 call it, only applies to emails. So we are not talking  
10:33:00 2 about --

10:33:04 3 THE COURT: Other kinds of documents.

10:33:06 4 MR. SPRUNG: Yes, this slide only applies to that.  
10:33:08 5 And there are other kinds of documents. They have different  
10:33:10 6 policies that apply to those, and none of them, none of the  
10:33:14 7 policies are as aggressive as the email policy.

10:33:18 8 And if we can move on from this slide, really it's a  
10:33:20 9 context to explain why it is that we want -- because  
10:33:24 10 everything is done in emails, why it is that we want to, you  
10:33:30 11 know, kind of turn every rock upside down to try to find other  
10:33:34 12 documents.

10:33:34 13 MR. MOGIN: I need to, at this point I think, your  
10:33:36 14 Honor, draw a large footnote that is unique to IP, some of the  
10:33:42 15 other defendants to a lesser extent.

10:33:46 16 During the motions to dismiss, the defendants argued  
10:33:50 17 that the box aspect of these companies' business was not part  
10:33:56 18 of the case. Judge Shadur flatly and expressly rejected that  
10:34:02 19 argument. Nonetheless, in responding to the RPDs, defendants  
10:34:10 20 have attempted to cut us off from information about what goes  
10:34:14 21 on in the box businesses.

10:34:18 22 So what we are telling you now about sources and what  
10:34:20 23 we know about sources is, as I understand it, unique to the  
10:34:26 24 containerboard business. But we have little or no information  
10:34:30 25 at this point about the box businesses.

10:34:34 1 MR. McKEOWN: That's not right. We have a number of  
10:34:36 2 custodians that came from the box side of the business.

10:34:38 3 MR. MOGIN: We don't even have organizational charts.

10:34:42 4 MR. McKEOWN: That's not true either, Dan.

10:34:44 5 THE COURT: Okay.

10:34:44 6 MR. McKEOWN: Mr. Sprung has the org charts because  
10:34:48 7 we sent them to him prior to the 30(b)(6) deposition.

10:34:50 8 MR. SPRUNG: No, I have them here.

10:34:52 9 MR. McKEOWN: He has asked for some supplementation,  
10:34:54 10 but we have provided some org charts.

10:34:56 11 MR. MOGIN: We have been through the org charts, and  
10:34:58 12 we see nothing about the box business. There is not a single  
10:35:00 13 box manager listed on any org chart.

10:35:02 14 MR. McKEOWN: Plant manager?

10:35:04 15 MR. MOGIN: Yes.

10:35:04 16 THE COURT: Okay. Okay.

10:35:06 17 MR. McKEOWN: I'm sorry.

10:35:06 18 THE COURT: That's why we are doing this. Okay? And  
10:35:10 19 we have so many --

10:35:12 20 MR. SPRUNG: Sub-issues.

10:35:14 21 THE COURT: Well, we also have -- I mean, this is  
10:35:18 22 just huge, so that's why we are doing this.

10:35:28 23 MR. EIMER: There does seem to be a basic  
10:35:30 24 misunderstanding of what we have given them and what they have  
10:35:34 25 found.

10:35:34 1 THE COURT: Because there is -- this is what I saw.  
10:35:38 2 This is how I spent my Memorial Day is -- the imperfect part  
10:35:46 3 of our system is you guys are going as fast as you can in  
10:35:52 4 trying to get the material to them, but we haven't written in  
10:35:56 5 any review -- we haven't review or absorption time. There is  
10:36:02 6 no way to absorb all this stuff that's coming in because of  
10:36:08 7 the huge amount of data in this case. I mean, it's like first  
10:36:14 8 you notice a problem, and then you try to figure out how  
10:36:18 9 you're going to be able to address it.

10:36:20 10 MR. EIMER: Right.

10:36:20 11 THE COURT: Unlike 99 percent of my cases in which  
10:36:24 12 people could absorb what they received in the 30-day period of  
10:36:28 13 time, you can't do that here.

10:36:30 14 MR. EIMER: Well, this is unique for antitrust cases  
10:36:34 15 too. There is nothing unique about antitrust that causes this  
10:36:36 16 to be different.

10:36:38 17 But I agree with you. The normal course would have  
10:36:40 18 been for us to produce the material, then to digest the  
10:36:42 19 material, and for them to tell us what's missing. For some  
10:36:44 20 reason, what's missing came before the analysis.

10:36:48 21 THE COURT: Which is why we are kind of breaking it  
10:36:50 22 down, which is why I'm also so glad, again, you're here  
10:36:54 23 because I would imagine that things look different from inside  
10:36:58 24 the company, like, you know, what are you people doing, why  
10:37:00 25 aren't you moving, moving, moving, and nothing is better for



10:37:06 1 you literally to see this, that it's a work in progress here.

10:37:10 2 MR. SPRUNG: May I?

10:37:10 3 THE COURT: Yes.

10:37:12 4 MR. SPRUNG: So with regard to the org charts, you  
10:37:14 5 know, I'd love to be educated on where box plants are in the  
10:37:20 6 org charts, but let's do that -- since we are not prepared  
10:37:24 7 right now to take that on, let's stick with the issues that we  
10:37:28 8 have outlined. Mr. McKeown and I are meeting this afternoon  
10:37:32 9 continuing this.

10:37:32 10 THE COURT: Good. Good.

10:37:34 11 MR. SPRUNG: And so, you know, we need to make sure  
10:37:38 12 we have all the org charts, and hopefully we both agree about  
10:37:44 13 that, and we can talk about it this afternoon.

10:37:46 14 So if you turn, your Honor, to slide 3, which I think  
10:37:50 15 you're at.

10:37:50 16 THE COURT: I am.

10:37:52 17 MR. SPRUNG: These are the disputes that we have over  
10:37:56 18 IP's custodian. If I could start with the litigation hold.

10:38:02 19 So IP has refused to disclose the employee, and  
10:38:06 20 that's the left-hand box, the employees of litigation holds.  
10:38:12 21 And if you turn to the next slide, that slide specifically  
10:38:16 22 addresses lit holds, the issue of lit holds, which is our  
10:38:22 23 first issue. So what we have done here is we have laid out  
10:38:26 24 what Rule 26(a)(1) requires, which is that each party disclose  
10:38:30 25 the name of each individual likely to have discoverable

10:38:34 1 information.

10:38:36 2 IP sent us a letter which said, Define custodians,  
10:38:44 3 the people -- you know, Define people who received lit holds  
10:38:50 4 as custodians and then define custodians as those people  
10:38:54 5 likely to possess potentially relevant documents and data. So  
10:38:58 6 in our view, their definition of who received lit holds  
10:39:04 7 matches very -- tracks very closely the definition of who a  
10:39:08 8 party is required to disclose to the other side under Rule  
10:39:12 9 26(a)(1). And so we would like IP to disclose to us -- to  
10:39:18 10 comply with Rule 26(a)(1) and disclose to us those people who  
10:39:22 11 they have said, who they have determined, are likely to  
10:39:24 12 possess potentially relevant documents and data.

10:39:26 13 THE COURT: Okay.

10:39:28 14 MR. SPRUNG: They refused to do that. And if we  
10:39:32 15 could make progress on that issue, I mean, we would like them  
10:39:36 16 to disclose those individuals. So far they have refused.

10:39:38 17 THE COURT: Right.

10:39:40 18 MR. SPRUNG: That's the first issue for us.

10:39:42 19 MR. EIMER: Let me address that. First, we have done  
10:39:44 20 our 26(a)(1) disclosures. This quote stops in the middle of a  
10:39:50 21 sentence, as your Honor knows. (A)(1) says we have to  
10:39:54 22 disclose the name and, if known, the address and telephone  
10:39:58 23 number of each individual likely to have discoverable  
10:40:00 24 information, dash, along with the subjects of that  
10:40:04 25 information. Then what's missing is that the disclosing party

10:40:06 1 may use to support its claims or defenses. That's what's  
10:40:10 2 missing.

10:40:12 3 So, first of all, we have disclosed those people.  
10:40:14 4 It's not anybody who has discoverable information that's  
10:40:16 5 required to be disclosed by that part of the rule that they're  
10:40:20 6 citing. It's the people who support our claims or defenses.

10:40:22 7 Second on this, the people that get hold orders are  
10:40:28 8 not necessarily those people who have discoverable  
10:40:32 9 information. Those are sent out; I think Temple-Inland told  
10:40:36 10 you yesterday they notified everybody in the company.

10:40:36 11 THE COURT: Right.

10:40:40 12 MR. EIMER: That was their way of doing it. That was  
10:40:42 13 5,000 people, I think they said yesterday. We didn't get to  
10:40:44 14 5,000, but we got to hundreds of people that it was sent to, a  
10:40:48 15 substantial list, and I am very certain that the description,  
10:40:52 16 the analysis of who got the hold order, was done by counsel,  
10:40:58 17 and the selection of those names is our work product. They  
10:41:02 18 are not entitled to that any more than they are entitled to  
10:41:04 19 the list of the people that Mr. McKeown or I decide to  
10:41:08 20 interview. Certainly those people they would like to know as  
10:41:12 21 well, but if I decide I want to interview 500 people in the  
10:41:14 22 company because I think they might have information relevant  
10:41:18 23 to the case, they're certainly not entitled to know who I have  
10:41:20 24 decided to interview. This is exactly the same thing, if it  
10:41:24 25 has relevance at all.

10:41:26 1 Every company, when a suit is filed, in order to  
10:41:30 2 avoid spoliation, sends out a mass mailing in order to cover  
10:41:36 3 the waterfront and more. No one wants to be accused of not  
10:41:40 4 notifying the relevant people. So to some extent, it does  
10:41:44 5 contain people who we have on -- it contains all the people on  
10:41:48 6 our custodian list, all of those people included: the small  
10:41:52 7 one, the expanded one, the people they are talking about  
10:41:54 8 including later. All of those people were included. There is  
10:41:56 9 no doubt about that.

10:41:58 10 This has never been my experience where the list of  
10:42:00 11 the hold order -- the people getting the hold orders are  
10:42:02 12 disclosed. We give them, the plaintiffs, the information they  
10:42:06 13 need to make selections of the people that are relevant. They  
10:42:10 14 have org charts. We may debate whether they have the ones  
10:42:14 15 they want or not, but at the end of the day, they are entitled  
10:42:16 16 to org charts that they should get that are relevant. We  
10:42:20 17 agree with that.

10:42:20 18 They take discovery depositions of the people who  
10:42:24 19 have knowledge of the organization of the company to see who  
10:42:26 20 the relevant employees are. That's the way it's always been  
10:42:30 21 done. And I have never seen these lists of names disclosed  
10:42:34 22 any more than the lists of people I interview are disclosed.

10:42:38 23 THE COURT: All right.

10:42:38 24 MR. SPRUNG: I'd be happy to respond.

10:42:40 25 THE COURT: Please do.

10:42:42 1 MR. SPRUNG: There are cases that specifically  
10:42:44 2 address this issue, and the eBay antitrust case, and I can get  
10:42:50 3 the cite for your Honor.

10:42:50 4 THE COURT: I have it.

10:42:52 5 MR. SPRUNG: I think it was a 2010 case. It  
10:42:56 6 expressly says that -- the judge ruled that defendant is  
10:43:02 7 required to disclose those individuals who received litigation  
10:43:08 8 holds.

10:43:08 9 But let me address Mr. Eimer's -- as I understand it,  
10:43:14 10 his main point, which is that this is attorney work product  
10:43:18 11 because they have gone through and interviewed all these  
10:43:22 12 people. What happens here is we are not asking for disclosure  
10:43:28 13 of every person that they have interviewed. What they have  
10:43:32 14 done is they have gone through and interviewed a bunch of  
10:43:36 15 people and identified -- and here is the letter, your Honor,  
10:43:40 16 with the language highlighted, that's the January 13th letter,  
10:43:44 17 and they identified those people who are likely to possess  
10:43:52 18 relevant information. We are not asking them to disclose  
10:43:56 19 everyone they talked to. We are only asking them to disclose  
10:44:00 20 those people that they made a determination are likely to  
10:44:04 21 possess relevant information. That's how they defined in  
10:44:08 22 their own letter those people who received lit holds. That's  
10:44:12 23 what they said to us. And we're now asking them -- and they  
10:44:16 24 used the language from Rule 26(a)(1), and we are now asking  
10:44:22 25 them to comply with 26(a)(1).

10:44:24 1 We are not saying to disclose everyone you  
10:44:26 2 interviewed. We are just saying disclose those people who,  
10:44:28 3 after you interviewed them, you made a determination that they  
10:44:34 4 were likely to possess relevant information. The eBay case  
10:44:40 5 requires them to do that.

10:44:42 6 THE COURT: Right. Okay.

10:44:44 7 I think this is a perfect example of what appears to  
10:44:50 8 be an issue about litigation holds but is a far broader issue.

10:45:00 9 There are two cases that I know of, eBay and another  
10:45:04 10 one, that I just pulled up the other day. This is a very hot,  
10:45:10 11 contested issue. It seems like the hold itself, you know,  
10:45:18 12 there's now litigation about I want the hold itself, the  
10:45:22 13 language of the hold. We ascertained yesterday they are not  
10:45:26 14 asking that. They are asking for the names of the people who  
10:45:30 15 were under the litigation hold. And there's at least two and  
10:45:34 16 maybe three cases. I really didn't have to say this on the  
10:45:40 17 record yesterday since Temple went the other way and had  
10:45:44 18 5,000, they put everybody in the company in the hold, I  
10:45:48 19 certainly see some reasons. I don't think it's -- I mean, I  
10:45:54 20 don't know whether it's work product. I am not a hundred  
10:45:56 21 percent sure on that.

10:46:04 22 But the bigger issue here that is overriding  
10:46:08 23 everything are the number of custodians, not the number, not  
10:46:12 24 the actual number, because I actually think you could have one  
10:46:14 25 custodian who might have the smoking gun, who might have the

10:46:20 1 killer documents, and you would not need it. But in a case as  
10:46:24 2 broad as this and plaintiffs, without an insider who is giving  
10:46:30 3 them information on which way to go here, are needing some  
10:46:36 4 overall information so that they can get to what they really  
10:46:44 5 need, is what I think.

10:46:48 6 I think this is like a Hail Mary -- another Hail Mary  
10:46:54 7 pass on custodians, is what I think it is. How do you get to  
10:46:58 8 figure out who are the key players? And, you know, this is  
10:47:06 9 like -- in an asymmetrical case too, because I think there is  
10:47:12 10 a tension that you guys are giving, giving, giving, they are  
10:47:16 11 not giving a damn thing, and it doesn't seem fair. Well, take  
10:47:20 12 that off the table. It's not fair.

10:47:24 13 And I don't see this litigation hold -- I think it's  
10:47:28 14 just another way for them to kind of figure out -- here's what  
10:47:32 15 I said to Temple even yesterday. By giving the name on the  
10:47:36 16 litigation hold doesn't mean they become custodians. I am  
10:47:42 17 going to give you my word of honor on this. I think if you  
10:47:46 18 tell them the names you think within two weeks, they're going  
10:47:50 19 to come back with a new request, and they may come back, but  
10:47:54 20 it's not up to them completely. But that's what I'm saying  
10:47:58 21 right now because -- can you tell us how many people were in  
10:48:02 22 the litigation hold? Can you tell me that?

10:48:06 23 MR. EIMER: Over 500. How that's going to help  
10:48:10 24 anything, I have no idea.

10:48:10 25 THE COURT: Well, because if they know what

10:48:12 1 departments they were in, if they know maybe time period, I  
10:48:18 2 mean, I am speaking for them, but, you know, here's always  
10:48:22 3 what the judge is doing. They're talking in very overbroad  
10:48:26 4 terms, you're talking in underbroad terms, and I am trying to  
10:48:30 5 assimilate both things to be able to get it.

10:48:34 6 But I'm telling you, giving them the list is not  
10:48:38 7 going to turn 500 people into custodians.

10:48:40 8 MR. EIMER: No, I understand that, and I appreciate  
10:48:42 9 that.

10:48:42 10 THE COURT: Do you hear me on that?

10:48:46 11 MR. MOGIN: Absolutely.

10:48:46 12 THE COURT: Do you hear me loud and clear on that?

10:48:50 13 And this is going to be one thing we're going to talk  
10:48:52 14 about with the big group in two weeks. We are going to put it  
10:48:54 15 on the agenda, we are going to put the cases on the agenda,  
10:48:58 16 everybody read the cases. You know, you could have other --  
10:49:06 17 you could have other litigation considerations, you could have  
10:49:08 18 other reasons why maybe it's better if I order it. I hate to  
10:49:12 19 say that, but maybe it's better if I order it than you  
10:49:16 20 voluntarily do it, but the same result comes to them.

10:49:22 21 That's kind of where I am. And this has got nothing  
10:49:26 22 to do with the content of the hold.

10:49:28 23 But yesterday we circled custodians, we kept -- Dan  
10:49:34 24 tried to say it in the beginning, he said maybe it really is a  
10:49:38 25 custodian problem, I cut him off, you know; but it's like



10:49:44 1 certainly with requests to produce, certainly the way you guys  
10:49:48 2 have paraphrased, Give me everything and you put it to  
10:49:52 3 executives with. That sort of framed the issue I think.

10:49:58 4 All right.

10:50:02 5 MR. McKEOWN: In terms of -- you are talking about  
10:50:04 6 names.

10:50:04 7 THE COURT: Names.

10:50:04 8 MR. McKEOWN: If we give names, the next thing we are  
10:50:06 9 going to get from the plaintiffs is a request for titles, I  
10:50:12 10 would gather.

10:50:12 11 THE COURT: But here's something --

10:50:14 12 MR. McKEOWN: Could we just give the titles?

10:50:16 13 THE COURT: No. Here is something that I thought of  
10:50:20 14 last night, which is why it's so good that you've done all  
10:50:22 15 this production already, is we were having a real battle  
10:50:32 16 yesterday. Unfortunately, they didn't have all the charts  
10:50:36 17 that you brought today, so thank you for bringing those  
10:50:40 18 charts.

10:50:40 19 All right. They started to review the email. Nan is  
10:50:44 20 now the CEO of International Paper. Okay? Nice little  
10:50:52 21 grandiose thought here. So I have become the CEO. You have  
10:50:56 22 all Nan's emails. I am writing to Chris. These folks have no  
10:51:02 23 idea who Chris is. Okay? One of the functions of broader  
10:51:10 24 charts, which, again, yesterday was if you tell us broader on  
10:51:16 25 the charts who all these people are, then again the fear is

10:51:20 1 Oh, my God, they're going to turn all those people into  
10:51:22 2 custodians. I mean, I think that's what's going on. But how  
10:51:28 3 can they read the email from Nan if they don't know who Chris  
10:51:32 4 is?

10:51:32 5 MR. EIMER: They could find out from the org charts  
10:51:36 6 or they could ask us.

10:51:36 7 THE COURT: Well, except you guys maybe have turned  
10:51:40 8 over every one of the org charts, although our expert here is  
10:51:46 9 kind of looking quizzical. This started with the most basic  
10:51:54 10 thing, an organizational chart with people's names on it.  
10:51:58 11 What could be more vanilla than that?

10:52:02 12 MR. EIMER: Right.

10:52:04 13 THE COURT: Right?

10:52:04 14 MR. EIMER: Right.

10:52:04 15 THE COURT: That's about as vanilla as you can get,  
10:52:08 16 because how can they read the documents if they don't know who  
10:52:10 17 these folks are?

10:52:12 18 MR. EIMER: But they have -- this is a discussion we  
10:52:14 19 should have. We agree they should have them. We think they  
10:52:18 20 have them.

10:52:18 21 MR. SPRUNG: So you agree that we should have all org  
10:52:22 22 charts for the containerboard and box plant business? Because  
10:52:26 23 I don't believe we have all org charts for the containerboard  
10:52:32 24 and box plant business.

10:52:32 25 And, Judge Nolan, I mean, I think your analysis that

10:52:40 1 -- the fact that they give us these org charts and the fact  
10:52:44 2 that they give us these lit hold recipients, all that does is  
10:52:48 3 give us information so we can make an assessment and go back  
10:52:50 4 to them. It's not obligating them to agree --

10:52:54 5 THE COURT: I understand, but I do understand in an  
10:52:58 6 asymmetrical case which is underpinning this entire thing  
10:53:02 7 where they are giving 90 percent of the material, so much is  
10:53:08 8 at stake for them, why they're pushing back is all I'm saying.  
10:53:12 9 And I'm saying if you're trying to do it in a mediation way as  
10:53:16 10 opposed to the judge writing an opinion and telling you what  
10:53:20 11 to do, it's also -- it may be harder for them to agree. I am  
10:53:26 12 acknowledging that, which is on the issues where we need to  
10:53:30 13 agree Jim is going to put a red beanie on and he is going to  
10:53:36 14 say, Okay, come on, you entered the order.

10:53:40 15 I am aware that this is hard, but I am telling them  
10:53:44 16 by giving some basic stuff, like the names on the litigation  
10:53:48 17 hold and the charts, that doesn't mean you're going off to the  
10:53:54 18 races.

10:53:54 19 MR. McKEOWN: On the org charts, let me say two  
10:53:56 20 things. I would like to go through some of the org charts we  
10:54:00 21 have given where our custodians fall.

10:54:02 22 But second is we don't think there is a need to get  
10:54:04 23 an org chart from every single box plant and every single  
10:54:08 24 containerboard plant. We have tried to give the org charts at  
10:54:12 25 the higher level, and that's the information we have provided.

10:54:14 1 MR. MOGIN: Respectfully, we went through the org  
10:54:16 2 charts and there is no information about the box plants. Zip.  
10:54:22 3 Number one.

10:54:22 4 Number two is your company is pretty well organized.  
10:54:26 5 We are talking about basically two levels of org charts: IP  
10:54:32 6 corporate and everything that relates to IP's industrial  
10:54:36 7 packaging business. That doesn't seem like that's  
10:54:42 8 particularly difficult. We really don't care about the  
10:54:44 9 production employees. We are really talking about sales,  
10:54:48 10 management, management staff.

10:54:50 11 MR. McKEOWN: There's over a hundred box plants out  
10:54:54 12 there.

10:54:54 13 MR. MOGIN: That would be -- if you gave us the  
10:54:58 14 names, that would be a hundred names.

10:55:00 15 THE COURT: The names of the plant and nothing else.

10:55:04 16 MR. MOGIN: Okay, if it's a hundred box plants, then  
10:55:06 17 it's a hundred pieces of paper for the org charts or maybe 2  
10:55:12 18 or 300.

10:55:12 19 MR. McKEOWN: But then you are going to ask for them  
10:55:14 20 going back years, which makes it very difficult over a long  
10:55:18 21 period of time because people will take positions so  
10:55:20 22 frequently.

10:55:20 23 MR. FREED: How many are box plants -- it seems to me  
10:55:22 24 what you are trying to do is get it both ways. Either you  
10:55:26 25 give us the names of the people on the lit hold and the

10:55:30 1 position, which to me is the simplest way in the world, and  
10:55:32 2 the magistrate has made it very clear it doesn't obligate you  
10:55:36 3 to then be considered as custodians, or you give us the names  
10:55:38 4 on all the org charts so we can figure it out. Why we would  
10:55:42 5 go the second way is beyond me.

10:55:44 6 MR. McKEOWN: So you are suggesting if you got the  
10:55:44 7 names and the position titles of the people on the lit hold,  
10:55:50 8 that --

10:55:50 9 MR. FREED: That will help us make the analysis.  
10:55:50 10 And, yes, we may come back and say of that number, we think  
10:55:56 11 some should be designated custodians. You may actually agree,  
10:55:58 12 shockingly, or you may not agree, and the magistrate has  
10:56:04 13 already said she hasn't made any determination whatsoever as  
10:56:06 14 to whether we're right just because you gave us the name and  
10:56:08 15 position of the people on the lit hold. But somewhere along  
10:56:10 16 the line, to break this log jam, I think that would be  
10:56:14 17 helpful. If you don't want to give us the org charts, tell us  
10:56:16 18 who they are and what they do.

10:56:18 19 THE COURT: So you take one or the other.

10:56:20 20 MR. FREED: Yeah. It seems you're trying to block us  
10:56:24 21 both ways.

10:56:24 22 THE COURT: Okay. Okay. One thing that would be  
10:56:28 23 very helpful this afternoon at your mini meeting, the meeting  
10:56:32 24 after the meeting with Mr. Sprung, would be if you'd actually  
10:56:36 25 go over the charts, because maybe the title -- I mean, I have

10:56:44 1 seen like just literally the title. Maybe the box plants,  
10:56:46 2 some of them are there and maybe they are labeled in a  
10:56:50 3 different way.

10:56:50 4 MR. FREED: I am making a ridiculous point, but if  
10:56:54 5 the person who got the lit hold notice is director of refuse  
10:57:00 6 -- getting rid of it --

10:57:00 7 MR. MOGIN: Distribution.

10:57:00 8 MR. FREED: -- distribution, thank you, we wouldn't  
10:57:02 9 care about it.

10:57:04 10 THE COURT: Right.

10:57:04 11 MR. FREED: It would give us enough information to at  
10:57:06 12 least at some level make a cursory determination that we just  
10:57:10 13 don't care about these people.

10:57:12 14 I want to make another point.

10:57:14 15 THE COURT: Yes.

10:57:14 16 MR. FREED: You have really stated it perfectly, that  
10:57:16 17 we do need -- because of the absence I acknowledge on our side  
10:57:22 18 of total information on their side, we do need to try to get  
10:57:26 19 as broad a brush as we can. But if we get millions of pieces  
10:57:30 20 of paper, we have no interest, and I mean this sincerely, in  
10:57:32 21 getting another half a million of useless pieces of paper.  
10:57:36 22 That is not our objective. This is not to punish them. We  
10:57:40 23 don't have the ability to punish them or make them give up  
10:57:44 24 because we are trying to get so much stuff. We are actually  
10:57:46 25 trying to get to relevant stuff.

10:57:48 1 THE COURT: Right.

10:57:48 2 MR. FREED: And if they can give us the names and the  
10:57:50 3 titles of these people, it will really assist us in whittling  
10:57:56 4 this down. We may reach disagreements, we may come back to  
10:57:58 5 you, you may have to decide, hopefully not, but at least let's  
10:58:02 6 get the process started. The way they're doing it now is  
10:58:06 7 we're blocked totally.

10:58:06 8 THE COURT: Okay.

10:58:06 9 MR. MOGIN: Your Honor, let me just make this one  
10:58:10 10 additional point. International Paper, there's only one  
10:58:12 11 company in this mix who is not a publicly-held company.  
10:58:16 12 International Paper is a publicly-held company. The idea that  
10:58:20 13 they don't have very detailed org charts going back is not  
10:58:26 14 fathomable because the auditors would never allow it.

10:58:30 15 THE COURT: Okay. That's going to be -- that's the  
10:58:34 16 easiest thing on the table, I mean, to me, to see if they have  
10:58:38 17 them, if they sent them, what you need in between, if they're  
10:58:42 18 willing to give it. And I actually, Mr. McKeown, is -- I  
10:58:50 19 mean, you're going to leave today with your own take on kind  
10:58:58 20 of what sincerity every other thing is here. But if it is a  
10:59:04 21 matter of organizational charts and these names to kind of get  
10:59:08 22 us going to the next place, then you're going to decide  
10:59:14 23 whether you can trust or them or not or you can trust me to  
10:59:18 24 enforce what I am saying to you.

10:59:18 25 MR. McKEOWN: I understand what you are saying, your

10:59:20 1 Honor.

10:59:22 2 THE COURT: Okay. Is this helping you? Is this  
10:59:26 3 giving us like a little structure here?

10:59:28 4 MR. McKEOWN: Somewhat, although I think it might be  
10:59:30 5 useful if we went through a little bit of who our custodians  
10:59:32 6 are because that sort of gap is --

10:59:38 7 THE COURT: Is that one of your pages?

10:59:40 8 MR. SPRUNG: No.

10:59:40 9 THE COURT: Oh, you've got it.

10:59:46 10 MR. SPRUNG: I've got it. But I'd love to -- it  
10:59:48 11 looks like it might be an org chart.

10:59:50 12 MR. McKEOWN: It's several org charts. So we start  
11:00:06 13 at the officer level. This is an officer org chart from March  
11:00:12 14 of 2010. You can see from the Bates number, it's been  
11:00:14 15 previously produced. The individuals circled in red are among  
11:00:18 16 our custodians.

11:00:18 17 THE COURT: Okay.

11:00:20 18 MR. McKEOWN: And so John Feracci is the chairman and  
11:00:22 19 CEO of International Paper. If you go to the far left column,  
11:00:26 20 that's the industrial packaging group, which includes both  
11:00:30 21 containerboard and the container group.

11:00:34 22 THE COURT: Now, wait, because they are making a  
11:00:36 23 distinction here.

11:00:36 24 So this is containerboard, and what's the second  
11:00:42 25 thing you said?



11:00:44 1 MR. McKEOWN: Containers, boxes.

11:00:46 2 THE COURT: All right.

11:00:48 3 MR. CAMPBELL: Could you tell us very quickly what  
11:00:50 4 the difference is?

11:00:50 5 MR. McKEOWN: Sure. If you think of the  
11:00:54 6 containerboard division, it is trees come in, they get chopped  
11:01:00 7 up, or recycled materials come in, they get mixed into this  
11:01:04 8 pulp, this sort of milky slurry, that then goes through a huge  
11:01:10 9 paper-making machine, through all the rollers. It's as long  
11:01:16 10 as a football field. It's 300 feet long. It comes off on  
11:01:26 11 gigantic rolls. It would probably fill two-thirds of this  
11:01:28 12 courtroom. And when it comes off of there, it could be 300  
11:01:30 13 inches wide. Then it gets rewound and sliced into great big  
11:01:34 14 rolls of what they call containerboard, but you and I would  
11:01:38 15 see it and say it looks like brown paper. Okay?

11:01:40 16 THE COURT: Okay.

11:01:40 17 MR. McKEOWN: So the product of containerboard is  
11:01:42 18 that linerboard, which is the outside of the corrugated  
11:01:46 19 material, and then there's also a product known as medium,  
11:01:50 20 which is the wavy material in the middle of the corrugated,  
11:01:54 21 that's called medium, that's also made in the same type of  
11:01:58 22 process, but when it comes off, what you have are these  
11:02:02 23 gigantic rolls of linerboard and medium. That's the  
11:02:08 24 containerboard division. That's made at a mill, as  
11:02:10 25 distinguished from the plant.

11:02:12 1 A box plant, or sometimes converting plant, and I  
11:02:16 2 think both Mr. Mogin and I mix the terms occasionally as to  
11:02:20 3 which we are using, but what happens at those plants is there  
11:02:26 4 is a large machine known as a corrugater. These very large  
11:02:30 5 rolls, two linerboard rolls and a medium roll, are fed through  
11:02:38 6 this very high-speed machine. In the machine is a big wheel  
11:02:46 7 that creates the curved part for what you see is the medium,  
11:02:50 8 the corrugated in the middle, and because it comes in a roll,  
11:02:54 9 it's just a flat roll of material.

11:02:56 10 What comes out at the other end are sheets, sheets of  
11:03:00 11 corrugated material. Those then may be sold as sheets or, in  
11:03:06 12 a box plant or converting facility, what usually happens is  
11:03:10 13 there's a number of other machines where those sheets are then  
11:03:12 14 fed and they come out as your pizza box or the box the apples  
11:03:16 15 are going to be shipped in or the box that the iPods are all  
11:03:20 16 going to put in, et cetera, and that's a box plant or a  
11:03:24 17 converting facility.

11:03:26 18 THE COURT: So because I have not memorized the  
11:03:28 19 complaint, does the conspiracy involve both containerboards  
11:03:32 20 and container boxes, the object of the conspiracy is both?

11:03:38 21 MR. MOGIN: Yes.

11:03:38 22 MR. McKEOWN: The plaintiffs' claim is an increase in  
11:03:40 23 price in both.

11:03:42 24 THE COURT: In both. Okay. Got it. That helps.

11:03:44 25 MR. McKEOWN: Now, if you look at this chart, the far

11:03:48 1 left -- this is just the officer chart now.

11:03:50 2 THE COURT: Right.

11:03:52 3 MR. McKEOWN: We go to the IPG org chart in a moment.

11:03:54 4 The far left column is industrial packaging.

11:03:58 5 THE COURT: For board --

11:04:00 6 MR. McKEOWN: Industrial packaging group contains  
11:04:02 7 both containerboard and containers and the box side. So that,  
11:04:12 8 for example, if you go down to the fourth box in that column,  
11:04:16 9 there is William Hoel, H-o-e-l, VP, Container of the Americas.  
11:04:24 10 That's the box group.

11:04:28 11 Also on this chart to the right side among our  
11:04:30 12 custodians is Timothy Kelly, the vice president of  
11:04:36 13 manufacturing for containerboard side, and farther over, the  
11:04:42 14 CFO and the investor relations person.

11:04:44 15 THE COURT: Okay.

11:04:46 16 MR. McKEOWN: Then there's also an IPG org chart, and  
11:04:50 17 we have produced these at various periods of time.

11:05:10 18 MR. SPRUNG: Can I ask you a question?

11:05:12 19 MR. McKEOWN: Yes.

11:05:14 20 MR. SPRUNG: So we have only gotten this org chart of  
11:05:16 21 the executive officers back through 2008.

11:05:18 22 MR. McKEOWN: Correct. We are looking for the rest.  
11:05:22 23 I was not aware that you had not received it earlier. But I  
11:05:26 24 got your letter or email. I can't remember what it is.

11:05:28 25 MR. FREED: And the other thing, correct me if I'm

11:05:30 1 wrong, if you look at that column on the left, we would have  
11:05:34 2 no way of knowing that that included boxes because there isn't  
11:05:36 3 an identifying word which signals that.

11:05:38 4 MR. McKEOWN: I am guessing, though, that by now, you  
11:05:42 5 have read our 10(k)s and it would be pretty clear.

11:05:46 6 MR. FREED: We shouldn't have to go to external  
11:05:48 7 sources to do that.

11:05:50 8 MR. McKEOWN: Mike, as I recall, you were also in the  
11:05:52 9 linerboard case a number of years ago.

11:05:54 10 MR. MOGIN: Actually, I just read the 10(k) as we  
11:05:56 11 were sitting here as you were speaking, and it says nothing  
11:05:58 12 that I saw --

11:05:58 13 THE COURT: Okay.

11:06:00 14 MR. MOGIN: -- when describing the business units  
11:06:02 15 that containers of americas was the box business.

11:06:04 16 MR. McKEOWN: All right.

11:06:06 17 THE COURT: That's good. Okay. So this helps us.

11:06:10 18 MR. FREED: Yes.

11:06:10 19 MR. McKEOWN: The IPG org chart --

11:06:14 20 THE COURT: What is IPG?

11:06:14 21 MR. McKEOWN: This is industrial packaging group.

11:06:16 22 THE COURT: Okay.

11:06:18 23 MR. McKEOWN: This is further breakdown of what was  
11:06:18 24 the left column on the officer org chart. And again circled  
11:06:24 25 in red are folks that are within our custodians.

11:06:28 1 And so, you know, Carol Roberts was a senior vice  
11:06:34 2 president of Industrial Packaging at this time. She and her  
11:06:36 3 assistant are both included. Tim Kelly is the vice president  
11:06:40 4 of manufacturing. He is there. Glenn Landau is the vice  
11:06:46 5 president and GM of containerboard and recycling. And you see  
11:06:48 6 three of his direct reports, including the manager of domestic  
11:06:52 7 sales for containerboard is there.

11:06:56 8 Bill Hoel is the vice president and GM of Container  
11:07:00 9 of Americas. That's the box business. And under him, each of  
11:07:04 10 the VPs and general managers in the box business are listed as  
11:07:10 11 custodians. There is a VP of finance, and one of his analysts  
11:07:12 12 and there is a senior communications manager.

11:07:16 13 We also have, I don't want to necessarily go into  
11:07:20 14 detail, Mr. Sprung and I can do it later on some of these  
11:07:24 15 other org charts, but we think we have provided far more  
11:07:26 16 custodians than any of the other defendants and that we have  
11:07:30 17 gone about it in a reasonable way. And while, you know, we  
11:07:36 18 are willing to talk about a few more custodians, again, I  
11:07:38 19 think as I said with my second point at the beginning, we'd  
11:07:42 20 like to reach some resolution and move on.

11:07:44 21 MR. FREED: We would like to help you do that,  
11:07:46 22 believe it or not, and that's why this list of who these  
11:07:48 23 people are on the lit hold and their titles would help us get  
11:07:52 24 there.

11:07:52 25 We would also like to make closure to this. This

11:07:56 1 doesn't benefit anybody to go through this.

11:07:58 2 THE COURT: Good. That's very positive.

11:08:04 3 MR. SPRUNG: And if I may just address, agree, these  
11:08:10 4 are very helpful, and we -- and showing what has been -- those  
11:08:20 5 people who have been designated as custodians is helpful.

11:08:24 6 There are some people on here individuals with whom  
11:08:26 7 we have disagreement. We haven't -- you haven't agreed to  
11:08:30 8 designate them. And we can talk about those individuals; we  
11:08:34 9 have a little already.

11:08:36 10 I think the more important thing is if you look at  
11:08:40 11 the IPG org chart, there are a couple of categories that stand  
11:08:46 12 out, and I think it might be useful to talk about that a  
11:08:50 13 little bit.

11:08:50 14 THE COURT: Okay. As an example?

11:08:52 15 MR. SPRUNG: Yes.

11:08:52 16 THE COURT: I think that's good.

11:08:54 17 MR. SPRUNG: So here for the IPG org chart, the  
11:08:58 18 middle one, as I understand it, Jim, the people who you've  
11:09:06 19 circled in the boxes going down under Bill Hoel are the  
11:09:14 20 general managers or the VPs for sales.

11:09:18 21 MR. McKEOWN: They are the regional VPs, correct.

11:09:20 22 MR. SPRUNG: Regional VPs.

11:09:22 23 And under those people are the salesmen, the sales  
11:09:24 24 representatives, the people who are going out and selling.

11:09:28 25 MS. BULA: That's not correct.

11:09:30 1 MR. SPRUNG: Okay. That would be helpful to know who  
11:09:32 2 those people are.

11:09:32 3 MS. BULA: The people who you are looking at here are  
11:09:34 4 the vice president and general manager are functional business  
11:09:38 5 folks for those particular regions. The individuals who are  
11:09:42 6 listed below them are the region GMs. They are not  
11:09:48 7 necessarily sales folks.

11:09:52 8 MR. SPRUNG: Okay.

11:09:56 9 MS. BULA: They are more the functional business  
11:09:58 10 manager. For example, under Peter Heist, you will see  
11:10:02 11 segment/region GM, and you have a number of names who are  
11:10:04 12 listed there.

11:10:06 13 MR. SPRUNG: Okay.

11:10:08 14 MR. MOGIN: So, for example, there one guy would be  
11:10:10 15 northern California, somebody else southern California, that  
11:10:12 16 kind of thing?

11:10:14 17 MS. BULA: Correct.

11:10:16 18 MR. MOGIN: And they run the totality of the business  
11:10:18 19 in those districts, correct?

11:10:20 20 MS. BULA: Correct.

11:10:20 21 MR. MOGIN: So they are not the salespeople in this  
11:10:24 22 district.

11:10:24 23 MS. BULA: They are not the salespeople. The sales  
11:10:26 24 group would report up to those region general managers.

11:10:30 25 MR. MOGIN: Do they have support staff within the

11:10:32 1 district or within the region in terms of strategic planning,  
11:10:36 2 in terms of budgeting, et cetera?

11:10:38 3 MS. BULA: They would have support staff in that they  
11:10:40 4 would have a controller. There is a controller for each  
11:10:44 5 region. For example, there is a controller for the west.

11:10:48 6 MR. MOGIN: And does pricing authority reside in the  
11:10:50 7 region?

11:10:52 8 MS. BULA: No. Pricing authority goes up higher.

11:10:56 9 MR. MOGIN: That's helpful. Thank you.

11:10:58 10 MR. SPRUNG: The issue that I wanted to raise was  
11:11:02 11 that what often happens in price-fixing cases is that there  
11:11:12 12 are salespeople who are told to sell their product at a  
11:11:18 13 particular price, at a fixed price, and they object to that.  
11:11:24 14 They object that the price is too high. They say, We're going  
11:11:26 15 to get business taken by our competitors if we sell it at this  
11:11:32 16 price.

11:11:32 17 THE COURT: The individual salespeople themselves.

11:11:34 18 MR. SPRUNG: The individual salespeople say that.

11:11:36 19 And they report back to these functional managers or  
11:11:40 20 some supervisor, and they say, I don't want to have to sell my  
11:11:46 21 product at that price because I am not going to be able to  
11:11:48 22 sell it and our competitor is going to take the business. And  
11:11:54 23 what the manager says to the salesperson is, We have made a  
11:11:58 24 decision that we want you to sell at that price.

11:12:00 25 And those emails from the sales representatives are



11:12:08 1 extremely hot documents in these cases. And I have cited, you  
11:12:12 2 know, some cases, and your Honor is probably familiar with  
11:12:16 3 them from your preparations, but on page 9 of our little sheet  
11:12:20 4 here, this just talks about -- this page 9 talks about one  
11:12:30 5 particular RFP, and I don't want to get caught mucked down in  
11:12:36 6 the details of this RFP. I want to talk about the broad point  
11:12:40 7 of production of documents from non-managers.

11:12:42 8 And the bullets down below, we believe that what has  
11:12:46 9 been excluded are, first, documents from non-management  
11:12:50 10 employees. And we have cited several cases where on summary  
11:12:56 11 judgment, the courts have said, Boy, it was the pocket  
11:13:00 12 calendar of the branch manager, it was the memorandum from a  
11:13:06 13 subordinate personnel describing a meeting with a market  
11:13:10 14 participant, it's an email to an account manager, it's these  
11:13:14 15 lower-level employees' documents that are important in  
11:13:22 16 evidencing the conspiracy because the senior level people who  
11:13:26 17 are engaged in the conspiracy are less likely to create  
11:13:30 18 documents evidencing the conspiracy.

11:13:34 19 And so what we would like is an agreement from IP  
11:13:40 20 that -- not to just restrict their production to these senior  
11:13:46 21 people, but to negotiate with us about lower-level people  
11:13:54 22 because that's where in other cases hot documents are coming  
11:14:00 23 in.

11:14:02 24 MR. EIMER: Those cases, as I understand the  
11:14:04 25 complaint here, are very different. This is not a

11:14:06 1 price-fixing case in the sense of these where the plaintiffs  
11:14:10 2 allege everybody got in a room and they agreed on what the  
11:14:14 3 price is. And that's where in the past, there might have been  
11:14:18 4 emails of people complaining about the so-called agreed-to  
11:14:20 5 price.

11:14:22 6 What's alleged here is that the very senior people of  
11:14:24 7 these companies somehow got together and agreed to reduce the  
11:14:30 8 production of containerboard and through supply/demand forces,  
11:14:36 9 that forced the price of containerboard up. That's a very  
11:14:42 10 different kind of case.

11:14:44 11 MR. MOGIN: Your Honor, you can review the complaint,  
11:14:46 12 and you will not find any allegation that the senior people  
11:14:52 13 did this. The allegation is that the companies did this.  
11:14:52 14 There is no specification that it was done by senior  
11:14:54 15 management whatsoever. And the supply restriction is a  
11:15:02 16 facilitating device or a mechanism in order to effectuate and  
11:15:08 17 to a certain extent police the price fix.

11:15:12 18 So it's not simply a supply restriction case. There  
11:15:20 19 are both elements that are in play.

11:15:22 20 MR. EIMER: There is no allegation that the companies  
11:15:24 21 got together and agreed on a price.

11:15:28 22 THE COURT: Is that correct?

11:15:28 23 MR. MOGIN: That's ludicrous.

11:15:30 24 THE COURT: Don't use adjectives.

11:15:32 25 MR. MOGIN: I'm sorry, your Honor. That's exactly

11:15:34 1 what the complaint alleges. The complaint couldn't be more  
11:15:36 2 clear.

11:15:36 3 THE COURT: What did Judge Shadur say the complaint  
11:15:38 4 alleged? I think since he is sort of your arbiter of when he  
11:15:44 5 denied their motion to dismiss -- you know, you don't have to  
11:15:48 6 go back to the opinion.

11:15:48 7 But I want to say something here, though. Mr.  
11:15:54 8 Sprung, thank you for thinking I don't know anything about  
11:15:58 9 antitrust. I don't. This is only my second in 14 years. But  
11:16:02 10 my background is in federal criminal defense. And one of the  
11:16:06 11 things I do know a lot about is RICO and mail fraud and  
11:16:10 12 corporate, you know, conduct or whatever we would call it. So  
11:16:16 13 I've been analogizing a lot to the -- I was in 47 juries in  
11:16:22 14 this building. I mean, I have a lot of experience on cases  
11:16:26 15 that actually went to trial, and I was very surprised when I  
11:16:32 16 got into this, Mr. Mogin was -- there was much more stress on  
11:16:38 17 these upper-level people. And so I didn't understand some of  
11:16:44 18 the documents asking for -- I mean, I never saw a CEO in 30  
11:16:50 19 years that they ever had a piece of paper on. Okay?

11:16:54 20 So I couldn't -- I was very surprised by the whole  
11:16:58 21 thing because I thought that's kind of counter to everything I  
11:17:04 22 knew in my white-collar commercial kind of cases, that it was  
11:17:10 23 usually people -- but that isn't the way -- when I got into  
11:17:14 24 this case in February, the way it was being told were all of  
11:17:20 25 these very high-level people, so I think there is a little bit

11:17:26 1 of a disconnect here. I don't think it's misstating anything.  
11:17:30 2 Maybe the case began -- maybe that's why there are 27  
11:17:34 3 custodians were the top people from the company.

11:17:38 4 Now, maybe there's been a shift in what you folks  
11:17:40 5 have understood too or you have been thinking, and you're now  
11:17:48 6 saying, No, we also need -- maybe we need some, as you have it  
11:17:56 7 here on the chart, non-manager, that you're interested.

11:18:00 8 Again, Mr. Sprung, when I went over everything over  
11:18:04 9 the weekend in the darn old request to produce, they were  
11:18:08 10 saying across all these boards. I mean, there was such broad  
11:18:16 11 requests that it was like hard to get -- you know, what is it  
11:18:22 12 you really want kind of issue is what I am saying.

11:18:26 13 Now you're being much more specific here on, you  
11:18:36 14 know, whether or not there's anything that falls there. But  
11:18:38 15 you're saying that salesmen in San Diego maybe got told to go  
11:18:46 16 and try to sell stuff at this higher price. He sends an email  
11:18:48 17 to his supervisor, who says, If you do that, they're going to  
11:18:54 18 turn us down and in fact making less money for the company  
11:18:58 19 than more money for the company and how do you as a plaintiff  
11:19:02 20 get to that kind of evidence. And these folks are saying,  
11:19:08 21 Hey, we didn't know that's what the case was about.

11:19:14 22 Right? Is that what you are saying?

11:19:16 23 MR. McKEOWN: In part. I mean, as we understand  
11:19:20 24 their theory of a conspiracy, it is different than, for  
11:19:26 25 example, the school milk cases in Florida a number of years

11:19:32 1 ago where there was an allegation that plant managers of local  
11:19:34 2 milk plants got together and rigged bids. That would be a  
11:19:38 3 local conspiracy involving branch managers or plant managers.

11:19:42 4 Here, as we understand their allegations of the  
11:19:44 5 conspiracy, it is a conspiracy to restrict capacity and  
11:19:48 6 thereby limit the amount of containerboard and thereby  
11:19:50 7 increase the price. The decision to restrict capacity at  
11:19:54 8 International Paper is made at the highest levels. It's not  
11:19:58 9 going to be made by someone out in the field at a low level.  
11:20:00 10 It's an executive-level decision. And that's why we selected  
11:20:04 11 our --

11:20:06 12 We have already spent in this process, just the  
11:20:08 13 document review processing, third-party vendors, outside  
11:20:12 14 counsel, over \$4 million to get where we are today. And we've  
11:20:18 15 given a lot of custodians, we have heard other folks get an A  
11:20:22 16 when they came into court with a fifth of our custodians, and,  
11:20:26 17 you know, at some point, there has to be some balancing of  
11:20:30 18 what do they really need and really want for this case and  
11:20:34 19 what are we going to give.

11:20:36 20 MR. MOGIN: Let me respond briefly, if I may, your  
11:20:38 21 Honor. First and foremost --

11:20:38 22 THE COURT: Try to do it calmly, though. Okay?

11:20:40 23 MR. MOGIN: First and foremost, we have been talking  
11:20:44 24 about masters and Sherpas. You have heard me use that --

11:20:46 25 THE COURT: Yes.

11:20:48 1 MR. MOGIN: -- ad nauseam.

11:20:48 2 THE COURT: Your favorite one, yes.

11:20:50 3 MR. MOGIN: Okay. So that's lower level and upper  
11:20:52 4 level.

11:20:54 5 Second, what you just heard Mr. McKeown do was to  
11:20:58 6 redefine the entire case in terms of an aspect of the case.

11:21:04 7 THE COURT: Okay.

11:21:06 8 MR. MOGIN: The allegation is that prices were fixed.  
11:21:10 9 We have talked about the mechanism of supply restriction, but  
11:21:14 10 that is not the totality of the fix that's alleged.

11:21:20 11 For example, and this is becoming more important as  
11:21:24 12 we review the documents, there is an allegation about fixing  
11:21:30 13 of indexes; that is, a lot of the prices in this business are  
11:21:36 14 set based on third-party indexes. So, for example, something  
11:21:40 15 called official board markets will say the price of  
11:21:46 16 containerboard this week is X dollars per ton, to put it in  
11:21:50 17 simplest form. And so a lot of contracts are expressed as you  
11:21:54 18 pay the OBM price plus or minus over the OBM price. So if the  
11:22:00 19 companies manipulate the OBM price, that's another mechanism  
11:22:06 20 for effectuating the fix. That's alleged in the complaint as  
11:22:12 21 well. That's not what you just heard from counsel.

11:22:18 22 So it's another instance of redefinition in order to  
11:22:24 23 fit what they want to defend and what they want to produce.

11:22:28 24 THE COURT: Well, that's your spin.

11:22:30 25 MR. SPRUNG: Your Honor?

11:22:30 1 THE COURT: That wouldn't be my spin. Because I  
11:22:34 2 think you're actually -- this is so mammoth that you're  
11:22:40 3 actually both defining and redefining -- with notice pleading,  
11:22:48 4 you are defining and redefining what the claims and defenses  
11:22:52 5 are. You are. This is not unusual, and thank God you haven't  
11:22:56 6 started the depositions before we get it figured out.

11:23:00 7 Yes?

11:23:00 8 MR. SPRUNG: Yes. Thank you.

11:23:02 9 So we're going to -- we disagree about whether there  
11:23:10 10 is price fixing.

11:23:12 11 THE COURT: That's true.

11:23:14 12 MR. SPRUNG: And Mr. Eimer -- whether we're alleging  
11:23:18 13 that, Mr. Eimer believes we are only alleging capacity  
11:23:22 14 restrictance (sic). That was not my understanding, frankly,  
11:23:26 15 of our complaint.

11:23:26 16 THE COURT: Right.

11:23:26 17 MR. SPRUNG: We believe, I believe, that we are  
11:23:28 18 alleging agreements on prices, and we are going to look at  
11:23:36 19 some documents and find out if there is some evidence of --  
11:23:40 20 you know, not just on supply but on prices as well, and we  
11:23:42 21 have already in looking at documents seen some indication that  
11:23:46 22 there are discussions about indices used to set prices.

11:23:54 23 So the point I was -- so we have a disagreement about  
11:23:58 24 that, and I think that one way to resolve or move forward is  
11:24:06 25 if your Honor looks at page 5, page 5 lists all these sources

11:24:14 1 of documents that IP has identified that the company has for  
11:24:26 2 collections of documents. And on the right-hand side, all the  
11:24:30 3 way over on the right, so on the left-hand side going down are  
11:24:36 4 the different sources of documents. Some of those are  
11:24:38 5 understandable, some of those are kind of code words that we  
11:24:44 6 have gotten to understand by talking to Mr. McKeown, but most  
11:24:48 7 of them are understandable. All the way on the right are  
11:24:50 8 containerboard sales employees below VP and GM level.

11:24:58 9 We can agree -- we have room to negotiate over which  
11:25:04 10 sources of documents we should get documents for for this  
11:25:10 11 category of employee. And so, you know, we would like, for  
11:25:16 12 example, emails. Do we need Lotus Notes applications for  
11:25:24 13 sales employees? Probably not. They have said we are not  
11:25:30 14 going to give you anything for these sales employees between  
11:25:38 15 VP and GM level, but we would at least like to negotiate with  
11:25:42 16 them over -- maybe all we need are their laptops and desktops  
11:25:46 17 and their emails and travel and expense reports.

11:25:54 18 But we are not able to even negotiate with them over  
11:25:58 19 these categories because they have said, We are not going to  
11:26:02 20 give you any of those because it's too expensive for us to  
11:26:08 21 search and produce documents from those individuals. And  
11:26:10 22 that's just not going to work for us.

11:26:12 23 THE COURT: Is that what you said? Did you say  
11:26:14 24 expense? Did you say expense? Because that's the first time  
11:26:18 25 I have heard anybody say expense in the case.



11:26:20 1 MR. McKEOWN: We have said burden.

11:26:22 2 THE COURT: Burden, okay.

11:26:22 3 MR. McKEOWN: Which is related to expense.

11:26:24 4 THE COURT: Okay.

11:26:24 5 MR. McKEOWN: But on this particular category, your  
11:26:26 6 Honor, I may be mistaken, but I think until today when we got  
11:26:30 7 this chart, we hadn't seen containerboard sales employees  
11:26:34 8 below VP/GM level on their list. We got a list from  
11:26:40 9 Mr. Sprung on April 16 that had 27 categories or individuals  
11:26:48 10 listed. A number of these, I think nine of them, we agreed to  
11:26:54 11 add as custodians.

11:26:58 12 THE COURT: Is this category part of it?

11:27:02 13 MR. McKEOWN: And I don't believe this category of  
11:27:04 14 containerboard sales VPs below VP/GM level was on that list,  
11:27:08 15 not that I would agree to it. He is correct in assuming what  
11:27:12 16 my position would be, but I say that only as an example of the  
11:27:16 17 plaintiffs are being very good about being aggressive and  
11:27:18 18 trying to get more and more custodians, and we think at some  
11:27:24 19 point, there is a balancing that has to be done. Every  
11:27:26 20 salesperson is not going to be happy with the price he is  
11:27:28 21 offered because he gets a commission if he sells product, and  
11:27:32 22 he's always going to want a lower price rather than a higher  
11:27:34 23 price. And the fact that his sales manager may tell him, you  
11:27:38 24 know, this is the price doesn't mean there is a conspiracy at  
11:27:42 25 some high level of the sort that's alleged here.

11:27:44 1 MR. MOGIN: But that has little, if anything, to do  
11:27:48 2 with discovery of that information.

11:27:50 3 And, your Honor, with respect to whether we've asked  
11:27:52 4 for it before, I'd simply refer you right back to one of the  
11:27:56 5 RPDs we were talking about yesterday, No. 3.

11:28:02 6 MR. McKEOWN: I am talking about in the meet and  
11:28:04 7 confer context.

11:28:04 8 THE COURT: Right.

11:28:06 9 MR. SPRUNG: And, Jim, we have not identified -- I  
11:28:12 10 mean, you're right, we haven't identified in our letters every  
11:28:16 11 single category of employee that we are going to seek. We  
11:28:24 12 don't yet have org charts. We haven't yet figured out what  
11:28:28 13 categories of employees exist.

11:28:32 14 And so our letter did identify the issues that we  
11:28:38 15 have been debating over up to now. We haven't even gotten --  
11:28:42 16 until recently, we haven't gotten some general managers on the  
11:28:52 17 list.

11:28:56 18 So, you know, we're picking our fights right now  
11:28:58 19 about things that you said you have already disagreed --  
11:29:02 20 you're already disagreeing with us about. You know, there  
11:29:06 21 might be additional employees once we see org charts or once  
11:29:10 22 we see this list that we are going to identify. I would say  
11:29:14 23 that these sales employees are in that category.

11:29:18 24 THE COURT: Okay.

11:29:20 25 MR. CAMPBELL: Can you give us an idea of how many

11:29:24 1 employees would fall in that category?

11:29:26 2 MS. BULA: I would be guessing.

11:29:28 3 THE COURT: Guess.

11:29:28 4 MR. CAMPBELL: A thousand?

11:29:30 5 MS. BULA: Hundreds.

11:29:30 6 THE COURT: Hundreds of thousands?

11:29:34 7 MR. McKEOWN: No.

11:29:36 8 MR. CAMPBELL: Hundreds.

11:29:40 9 THE COURT: Well, so if we were doing real mediation  
11:29:54 10 here and the mediator was summarizing what both sides are  
11:29:58 11 saying, which is what I do in my real mediations, my real  
11:30:02 12 non-e-mediations, you somewhat internally summarize what you  
11:30:10 13 hear both sides as saying is I hear IP saying they are scared  
11:30:18 14 to death to increase the scope because every time they are  
11:30:26 15 going to increase the scope, you guys are going to want more.

11:30:32 16 And you're saying realistically this is a really good  
11:30:38 17 -- page 5 is a very good best-that-you-can-do-for-June-1st  
11:30:50 18 guess at what your categories are, but I think you are very  
11:30:52 19 realistically saying there may be more from what we find. So  
11:30:58 20 I think that one of the goals of the mediation is to be able  
11:31:02 21 to take both sides' fears because that's what it's about, a  
11:31:10 22 lot is what people's fears are, and to be able to give each  
11:31:12 23 side some kind of comfort here.

11:31:20 24 I mean, if we were to be able to figure out a way,  
11:31:24 25 say, through sampling or some way to get you some

11:31:30 1 containerboard information about these VP/GM level -- and I  
11:31:38 2 don't really know if you're really going to depose all these  
11:31:40 3 people with these red circles. I mean, they're also thinking  
11:31:46 4 -- think about it from their perspective since they are the  
11:31:48 5 ones that have to produce all these people. I mean, it looks  
11:31:52 6 -- you know, you look at these flow charts, this is way over  
11:31:56 7 50 deps or, you know, 30 deps right here, so how the heck are  
11:32:04 8 you even going to get to -- even with a liberal judge, how the  
11:32:08 9 heck are you going to get to -- then you're going to start  
11:32:12 10 thinking -- I don't know if this is what Jim is thinking, but  
11:32:14 11 I am thinking he is thinking then how the heck are you going  
11:32:18 12 to do all of that down there too? It's not just get them the  
11:32:20 13 documents, put the hold, everything the company has to do to  
11:32:26 14 make this happen. And then their fear is six months from now,  
11:32:32 15 you're going to have four more categories. Am I right or  
11:32:36 16 wrong?

11:32:36 17 MR. McKEOWN: You are correct.

11:32:38 18 MR. EIMER: Correct.

11:32:38 19 THE COURT: I am correct.

11:32:40 20 And people are biting their tongues. I tell Mogin to  
11:32:42 21 stop it because he is the most feisty. But, I mean, I think  
11:32:54 22 internally, that's where we are.

11:32:54 23 So what are we going do to -- it seems to me like  
11:32:58 24 this category looks important, but I don't know if we ought to  
11:33:02 25 go full fledge ahead with the category, particularly before

11:33:08 1 there's even been this real review of what look like the top  
11:33:12 2 level.

11:33:14 3 MR. SPRUNG: And that's -- so, your Honor, that's why  
11:33:18 4 we --

11:33:18 5 THE COURT: But I like these categories because this  
11:33:20 6 is kind of saying this is probably -- this is probably, in the  
11:33:26 7 end, don't you think that looks like the way the case would  
11:33:30 8 kind of come in if you were doing your list of witnesses for  
11:33:32 9 trial? I mean, you know --

11:33:34 10 MR. MOGIN: Plus boxes; boxes aren't on the chart.

11:33:38 11 THE COURT: Well, now, so containerboard sales  
11:33:42 12 employees below VP/GM level, now that we know the difference  
11:33:50 13 between containerboard and container boxes, does that have to  
11:33:54 14 have another column then for container boxes? Same thing?

11:34:00 15 MR. MOGIN: One of the important issues in the case  
11:34:02 16 -- well, go ahead, Mike. You talk about the common impact  
11:34:04 17 issue.

11:34:04 18 MR. FREED: I wasn't going to talk common impact, but  
11:34:08 19 I was going to say there is not necessarily and not usually a  
11:34:10 20 correlation between custodians and number of depositions  
11:34:12 21 taken, and moving all the way to the far right of sales  
11:34:14 22 personnel below a certain level, we may get documentation and  
11:34:18 23 do in most cases for any number of sales personnel, we may  
11:34:22 24 take a relatively small percentage of the depositions, just  
11:34:26 25 enough to illustrate the point.

11:34:28 1 So even with the top-level people, while frequently  
11:34:30 2 the number of depositions we take is higher, we don't take the  
11:34:34 3 deposition always of every one of them because you can make  
11:34:36 4 the point if there is a document which goes out to five or six  
11:34:40 5 people, all regional sales executives, and it's an important  
11:34:46 6 document in our view, we may depose one or two. We are not  
11:34:50 7 going to depose 11 or 12 regional sales executives.

11:34:54 8 So while it's true we are trying to consider the  
11:34:58 9 importance and necessity of custodians, or sources, because  
11:35:02 10 it's not -- I don't want to go into the fact that sometimes  
11:35:04 11 these documents don't come from custodians but departments,  
11:35:08 12 expense reports and things of that kind, it isn't necessarily  
11:35:10 13 going to follow, your Honor, that a high percentage of those  
11:35:12 14 people whose documents -- people whose documents we see are  
11:35:16 15 going to be deposed.

11:35:16 16 THE COURT: Okay.

11:35:18 17 MR. FREED: Because we know that even though there's  
11:35:22 18 liberal judges are not going to allow 40 depositions from  
11:35:26 19 seven defendants. It's not going to happen. We are not  
11:35:28 20 suggesting that's where we want to go with this, but it does  
11:35:32 21 help us and refine those people we want to depose to know the  
11:35:34 22 kinds of documents that are being exchanged even among the  
11:35:38 23 people who we think are important custodians. And sometimes,  
11:35:44 24 yes, it's at the high levels, you always hope to find that,  
11:35:48 25 but a lot of times these cases are made -- I won't use the

11:35:54 1 example Sherpa, but they are made of the people who actually  
11:35:56 2 are the people who encounter the pushback from customers over  
11:36:00 3 company policies, and the way that they then are responded to  
11:36:04 4 by their superiors is often very revealing.

11:36:08 5 So I guess I am trying to -- I talk a lot, but the  
11:36:12 6 limited point I am saying is I am not correlating depositions  
11:36:14 7 and custodians. I think that's --

11:36:18 8 THE COURT: But you can understand what their concern  
11:36:18 9 is --

11:36:20 10 MR. FREED: Of course.

11:36:20 11 THE COURT: -- that the broader the corpus gets  
11:36:22 12 here --

11:36:22 13 MR. McKEOWN: And it's even beyond depositions, even  
11:36:24 14 the fact of having to produce documents --

11:36:26 15 THE COURT: Right.

11:36:26 16 MR. McKEOWN: -- and collect documents --

11:36:28 17 THE COURT: And to preserve.

11:36:30 18 MR. McKEOWN: -- and all these various types of  
11:36:30 19 documents from all these --

11:36:32 20 THE COURT: Now, we are going to take a potty break  
11:36:34 21 in a moment, but I want to end with something I forgot to say  
11:36:40 22 yesterday, that going back to my 30 years -- don't you love  
11:36:42 23 people's war stories? -- in white collar, they are not -- in  
11:36:48 24 white-collar matters, across the board, the number one defense  
11:36:54 25 to everything is some form of lack of intent, lack of

11:36:58 1 agreement, good faith, if you will.

11:37:02 2 I want to say, and this is why I am really glad you  
11:37:06 3 are here today, you need the documents as much as they need  
11:37:10 4 the documents. The one time in this building when a document  
11:37:16 5 was helpful and it wasn't the government shoving some document  
11:37:20 6 down our throat, we needed the documents in order to defend  
11:37:24 7 good faith. So there is here -- I understand, again, this  
11:37:30 8 basic tension, give me, give me, give me, no, go away, but you  
11:37:36 9 need the documents as much as they need them.

11:37:38 10 MR. McKEOWN: I agree completely.

11:37:40 11 THE COURT: And I think today is very helpful, even  
11:37:42 12 though it seems like it's getting broader, you're getting  
11:37:46 13 inside their head where they're going.

11:37:48 14 MR. McKEOWN: Your Honor, I agree completely that we  
11:37:52 15 need the critical documents as much as they do. We are also  
11:37:56 16 comfortable that the people who would be making the decisions  
11:38:00 17 that would be playing in this question as to the conspiracy  
11:38:02 18 alleged are within our named custodians.

11:38:04 19 THE COURT: Okay.

11:38:04 20 MR. MOGIN: Your Honor --

11:38:06 21 THE COURT: All right.

11:38:06 22 MR. MOGIN: -- we didn't ask for the people who made  
11:38:10 23 the decisions. We asked for information.

11:38:10 24 THE COURT: Right.

11:38:12 25 MR. MOGIN: And, secondly, the idea of burden --



11:38:14 1 THE COURT: Of what?

11:38:14 2 MR. MOGIN: Of burden. It's a two-way street. It  
11:38:18 3 costs us time and money to review worthless documents as well  
11:38:24 4 as it costs us time and money to review good documents.

11:38:26 5 THE COURT: Okay.

11:38:26 6 MR. MOGIN: We have no interest in burden for the  
11:38:30 7 sake of burden, of requesting documents for the sake of  
11:38:34 8 requesting documents. Volume is irrelevant to us. We are  
11:38:38 9 looking for the right documents.

11:38:44 10 THE COURT: All right. Ten minutes. We will be back  
11:38:48 11 here at a quarter to 12:00. And then I think we will stop on  
11:38:54 12 your chart and we will go to -- I have some bullet points  
11:38:56 13 here. I have a couple bullet points that I'd like to go over,  
11:39:02 14 if we can?

11:39:02 15 MR. SPRUNG: Yes. Your Honor, can I just make one  
11:39:04 16 last point?

11:39:06 17 THE COURT: Yes.

11:39:06 18 MR. SPRUNG: That is, I was hoping that this would be  
11:39:10 19 a mechanism for bridging our difference because there are  
11:39:16 20 maybe nine or 10 different sources of documents, and we can  
11:39:22 21 negotiate over what sources they look at for. And so, you  
11:39:30 22 know, we can both give on sources. What we don't want to do  
11:39:36 23 is just exclude an entire group of potential category of  
11:39:44 24 individuals.

11:39:44 25 MR. FREED: We can give on individuals too once we

11:39:46 1 have vetted them.

11:39:46 2 THE COURT: Right.

11:39:48 3 MR. SPRUNG: Yes.

11:39:48 4 THE COURT: Well, that's why it's good that we have  
11:39:52 5 two and a half weeks before our next meeting because we are  
11:39:56 6 going to have some time to I feel like absorb what we even  
11:40:02 7 learned here today.

11:40:02 8 So 10 minutes, everybody.

11:41:48 9 (Discussion off the record.)

11:41:52 10 (Short break.)

11:52:58 11 MR. McKEOWN: Your Honor, we have a proposal to try  
11:53:00 12 to break the log jam and see if we can't do something here to  
11:53:04 13 move this along.

11:53:08 14 International Paper has a number of mills. It has  
11:53:10 15 over a hundred box plants. What we propose is that the  
11:53:18 16 plaintiffs can pick any two of the mills and any two of the  
11:53:22 17 box plants, and we will do a search of the emails for the  
11:53:28 18 managers for those facilities and for the salesperson who is  
11:53:36 19 responsible for those facilities. They may not be in the  
11:53:40 20 plant or mill, because the mill salesperson, for example,  
11:53:42 21 won't be in the mill. And, you know, we will review the  
11:53:46 22 documents of those four individuals, and if, you know, our  
11:53:52 23 view would be that they would need to then come forward with  
11:53:54 24 some reason based on what they find to demonstrate why they  
11:53:58 25 should go any further.

11:54:00 1 THE COURT: Okay.

11:54:00 2 MR. FREED: Just so I understand, is that in lieu of  
11:54:04 3 also giving us the lit hold individuals or in addition to?

11:54:10 4 MR. McKEOWN: We have taken the lit hold individual  
11:54:16 5 question under advisement. We understand.

11:54:18 6 MR. FREED: That's separate.

11:54:18 7 MR. McKEOWN: That's a separate issue. This is going  
11:54:20 8 to --

11:54:22 9 MR. FREED: I thought so, but you should never assume  
11:54:24 10 those things.

11:54:24 11 MR. McKEOWN: This is going to the issue that  
11:54:28 12 Mr. Sprung raised before about these folks, and I can't  
11:54:30 13 remember if it was Judge Nolan or someone else that said, What  
11:54:32 14 about a sample?

11:54:34 15 THE COURT: Me.

11:54:34 16 MR. MOGIN: Your Honor, I don't know if you are a  
11:54:36 17 movie fan, but Jerry Maguire, there was a famous line, you had  
11:54:42 18 me at hello.

11:54:42 19 THE COURT: Show me the money.

11:54:44 20 MR. MOGIN: And show me the money. He had me at  
11:54:50 21 hello and then he took it away.

11:54:52 22 THE COURT: Well, no. He had me at hello, so what's  
11:54:54 23 the problem here? Because he just finished the sentence by  
11:54:56 24 saying he is going to give you four, he is going to do as much  
11:55:00 25 as they can, see what you find out from that, and then you're

11:55:08 1 going to come back. If anything looks like it's fruitful from  
11:55:12 2 that, that doesn't cut you off. It doesn't cut you off.

11:55:20 3 It seems to me -- I have a new favorite word  
11:55:24 4 overnight. It's called "sequential," as opposed to phase  
11:55:28 5 discovery. Now I am into sequential here.

11:55:32 6 MR. MOGIN: Do we need to parse that?

11:55:34 7 THE COURT: Right. I do.

11:55:40 8 MR. SPRUNG: Can I ask --

11:55:40 9 THE COURT: Can I say, Chris and I last night, our  
11:55:44 10 take away from yesterday is that you guys have done the most  
11:55:48 11 extraordinary one year of work I have ever seen. Chris and I  
11:55:52 12 have two cases that are single plaintiffs that go back to 2008  
11:55:58 13 and they haven't finished fact discovery. If I am correct,  
11:56:06 14 Milt Shadur, your opinion came down about one year ago this  
11:56:08 15 week. In one-year period of time, you have done so much  
11:56:14 16 discovery, I cannot believe it, considering what you have had  
11:56:18 17 on your plate. Unbelievable communication back and forth.

11:56:24 18 And as much as Jim wants us to go fast, it can't go  
11:56:30 19 this fast. That doesn't mean it's going to take 10 years, but  
11:56:34 20 it's somewhere in between now -- and I think this is a  
11:56:40 21 brilliant idea because this is kind of -- this is a little bit  
11:56:44 22 down the -- you know, the food -- this is a little bit down  
11:56:50 23 the tree here.

11:56:52 24 MR. MOGIN: I don't disagree. My issue was --

11:56:56 25 THE COURT: And that they affirmatively came up with

11:56:58 1 this suggestion themselves is terrific.

11:57:02 2 MR. MOGIN: Well, they actually were taking advantage  
11:57:04 3 of your suggestion about sampling.

11:57:08 4 THE COURT: Right. Because I'm so brilliant. Right.

11:57:08 5 MR. McKEOWN: We were, your Honor.

11:57:10 6 THE COURT: No, but isn't that good?

11:57:12 7 MR. MOGIN: It is good. The only issue is, from my  
11:57:16 8 perspective, A, I think it's light on the mills in terms of  
11:57:20 9 the numbers.

11:57:20 10 THE COURT: Right.

11:57:20 11 MR. MOGIN: But, B, it was the very last thing that  
11:57:26 12 was said is that the plaintiffs come back with some sort of  
11:57:32 13 reasoned basis, and I can just see -- for proceeding, and I  
11:57:38 14 can just see the mischief in that.

11:57:42 15 THE COURT: Well, I know, because you're operating in  
11:57:46 16 the old style, not in the new style, and this new style is you  
11:57:50 17 can go back to people, and hopefully you're building some  
11:57:52 18 trust over this. They're trusting that they're going to give  
11:57:58 19 you two, they're going to give you four, and if you don't need  
11:58:02 20 anymore, you're not going to ask for anymore.

11:58:02 21 MR. FREED: So I am going to put on my paranoid hat.

11:58:02 22 THE COURT: Yeah, right.

11:58:06 23 MR. FREED: They are going to give us four, but that  
11:58:08 24 gives them a certain ability to select the results --

11:58:12 25 THE COURT: No, you get to pick.

11:58:12 1 MR. McKEOWN: No, you pick.

11:58:14 2 THE COURT: You pick.

11:58:14 3 MR. FREED: Oh, okay. That's what I was going to  
11:58:16 4 ask.

11:58:16 5 MR. McKEOWN: You pick the list of mills, you pick  
11:58:20 6 the list of plants.

11:58:20 7 THE COURT: You pick, and they are going to give you  
11:58:24 8 the emails? They are going to kind of give you just emails,  
11:58:26 9 or what --

11:58:26 10 MR. McKEOWN: We would just do the emails. That  
11:58:28 11 seems to be what's in the most interest.

11:58:30 12 THE COURT: You do the emails to start, and you look  
11:58:32 13 at these four.

11:58:32 14 And this is simultaneous with other things. This  
11:58:36 15 isn't just that.

11:58:38 16 MR. FREED: I get it. This is a variation on Zagel's  
11:58:42 17 approach in Steel --

11:58:42 18 MR. EIMER: Right.

11:58:44 19 MR. FREED: -- which Andy actually alluded to  
11:58:46 20 yesterday. I'm not sure if --

11:58:46 21 THE COURT: I didn't know. It was over my head.

11:58:48 22 MR. FREED: I didn't think you picked up on it, but  
11:58:50 23 both Mr. Marovitz and Mr. Eimer and I are in the case with --  
11:58:54 24 among other things, Judge Zagel did something like this. This  
11:58:58 25 is a variation on it.

11:59:00 1 MR. EIMER: What Judge Zagel -- first he picked two  
11:59:02 2 defendants only, and he suggested that the two defendants pick  
11:59:06 3 the top 10 people.

11:59:10 4 It was also -- they may disagree, but it's also a  
11:59:14 5 supply restriction case.

11:59:16 6 MR. FREED: I disagree with the characterization  
11:59:18 7 here, but it is a supply restriction.

11:59:20 8 MR. EIMER: Supply restriction case. He said --  
11:59:20 9 Judge Zagel said a supply restriction case has to be  
11:59:24 10 implemented from the top, so pick your top 10 people, and then  
11:59:28 11 respond to the request for documents. And so two of us did.  
11:59:30 12 I was one of the unlucky two.

11:59:32 13 We did our production. U.S. Steel was the other one.  
11:59:36 14 They did their production. And then Judge Zagel looked at  
11:59:40 15 that and said, Okay, now I understand how it works, now the  
11:59:44 16 others do that. And the other defendants then followed up and  
11:59:46 17 they did their production after that.

11:59:46 18 MR. FREED: Can we think about this and maybe come  
11:59:50 19 back with -- we certainly aren't rejecting it. We would be in  
11:59:54 20 no position to reject it anyway. But think about it and come  
11:59:58 21 back with maybe some refinements or maybe say yes or --

12:00:00 22 THE COURT: That's perfect, don't you think?

12:00:02 23 MR. McKEOWN: Sure.

12:00:04 24 THE COURT: I mean, nobody is walking out of here  
12:00:06 25 with -- okay.

12:00:08 1 MR. FREED: I think if we can refine it, we might be  
12:00:12 2 able to work that out.

12:00:12 3 THE COURT: Good.

12:00:16 4 Now, let me go back to the beginning here. So my  
12:00:36 5 bullet points here were -- so the litigation hold names and --

12:00:48 6 MR. SPRUNG: Dates.

12:00:48 7 THE COURT: -- titles and dates, IP is considering  
12:00:56 8 that, right?

12:00:58 9 MR. EIMER: Right.

12:00:58 10 THE COURT: You are considering that. That's on  
12:01:04 11 considered to get back to you.

12:01:04 12 Okay. Even though I have to say the RPD to get to  
12:01:08 13 this, the first RPD on the -- we are still not talking about  
12:01:18 14 it, but on the board of directors or on the list of all the --  
12:01:22 15 first request under the RPD is all of the -- what do you call  
12:01:28 16 it? -- the board of directors. And you are saying yes, you  
12:01:36 17 think that you have turned them over, but you are going to go  
12:01:38 18 over that at the meeting today.

12:01:40 19 MR. McKEOWN: Correct.

12:01:40 20 THE COURT: You don't have any opposition to giving  
12:01:42 21 them --

12:01:44 22 MR. McKEOWN: I don't want to go down to every single  
12:01:46 23 mill and every single plant for org charts --

12:01:50 24 THE COURT: Right.

12:01:52 25 MR. McKEOWN: -- but with respect --



12:01:52 1 THE COURT: You're willing to talk about it. Okay?

12:01:52 2 MR. McKEOWN: -- to the other org charts, it's not an  
12:01:54 3 objection; it's a question of do we have them with respect to  
12:01:58 4 something, one of the areas that's at issue in this case.

12:02:02 5 You are obviously not asking about the paper  
12:02:04 6 division, for instance.

12:02:04 7 MR. SPRUNG: Yes. I mean, it would be helpful to  
12:02:06 8 have a better understanding of what those positions are that  
12:02:10 9 are on the org chart. I mean, Megan, what you said was the  
12:02:14 10 first I had heard it, I didn't -- so I don't understand  
12:02:18 11 necessarily from the title what the job is.

12:02:22 12 THE COURT: Well, here is something I thought of. I  
12:02:24 13 actually -- I think there was a little tension between both  
12:02:28 14 sides, but I thought the pre-30(b)(6) letters were incredibly  
12:02:40 15 helpful. And then they had -- you know, it was going to be an  
12:02:46 16 alternative to 30(b)(6), and it was really a good try to kind  
12:02:52 17 of make it, but I am sure the 30(b)(6) deps probably went  
12:02:56 18 better as a result of the letter.

12:03:00 19 I don't want to be turning everybody into letter  
12:03:04 20 writers, but some of the questions, Mr. Sprung, you might have  
12:03:10 21 when you start reviewing the documents, if you were to be able  
12:03:12 22 to ask pointed questions regarding the document just like we  
12:03:20 23 did here today might be a great way to be able to move things  
12:03:24 24 on, kind of -- would you have any problem with that, you  
12:03:28 25 answering?

12:03:28 1 MR. McKEOWN: It depends on what's all in the letter.  
12:03:30 2 If I get the equivalent of very lengthy interrogatories, I may  
12:03:34 3 have some concerns.

12:03:34 4 THE COURT: Right.

12:03:36 5 MR. McKEOWN: We have exchanged a number of letters  
12:03:36 6 that I think --

12:03:36 7 THE COURT: I can tell.

12:03:38 8 MR. McKEOWN: -- and I hope have helped provide  
12:03:40 9 things. We also provided a big stack of charts at the  
12:03:44 10 30(b)(6) deposition to explain all the IP systems which go to  
12:03:50 11 the transactional data which are fairly complex.

12:03:58 12 THE COURT: Okay. Let's talk about -- let's talk  
12:04:02 13 about IP's backup tapes for a moment. And what I mean by that  
12:04:10 14 is I've been talking -- here is where I have been talking  
12:04:22 15 phased discovery trying to get people to agree, but I haven't  
12:04:24 16 put it to a vote yet, is I saw phase one as active data.

12:04:36 17 Phase two were going to be the privilege logs -- I  
12:04:38 18 mean, where I am right now, phase two would encompass  
12:04:42 19 privilege log review and backup tapes. I am not saying the  
12:04:48 20 plaintiffs agree with me, but I am trying to sort of get my  
12:04:52 21 arms around this.

12:04:54 22 So I wanted to know individually what is the story on  
12:04:58 23 your backup tapes, do you have them, are they preserved, are  
12:05:06 24 they searchable, and do the plaintiffs understand -- whether  
12:05:14 25 they agree with you or not that you're giving it, do they

12:05:16 1 physically understand factually what your story is?

12:05:22 2 MR. McKEOWN: I think so.

12:05:24 3 THE COURT: Mr. Sprung?

12:05:26 4 MR. MOGIN: Go to the charts, your Honor.

12:05:26 5 THE COURT: Go to the chart. Okay.

12:05:28 6 MR. MOGIN: To the red box.

12:05:32 7 THE COURT: On page 1.

12:05:38 8 MR. SPRUNG: So, your Honor, I can tell you our  
12:05:44 9 understanding of backup tapes for emails, and then when we get  
12:05:48 10 to this chart which has some of their other types of  
12:05:52 11 documents, my understanding gets much --

12:05:56 12 THE COURT: Fuzzier.

12:05:56 13 MR. SPRUNG: Fuzzier, exactly.

12:05:58 14 THE COURT: Good.

12:05:58 15 MR. SPRUNG: So it would be helpful to have a better  
12:06:00 16 understanding.

12:06:00 17 THE COURT: Right.

12:06:02 18 MR. SPRUNG: So our understanding with email is that  
12:06:08 19 IP preserved their backup tapes for their exchange server at  
12:06:16 20 the time of the litigation hold on September 10th, 2010, which  
12:06:20 21 would mean that there are backup tapes for the exchange server  
12:06:26 22 that are preserved from September 6th through September 10th.

12:06:34 23 MR. McKEOWN: No, I don't think that's right. What  
12:06:36 24 happens is, first of all, I don't think backup tapes on emails  
12:06:40 25 are the same issue for us as they are for some of the other

12:06:42 1 defendants because IP only does five days. At the time of the  
12:06:46 2 litigation hold, a non-disaster recovery copy, which some  
12:06:54 3 might call a backup, of all these emails in my doc folders  
12:06:58 4 were made.

12:07:02 5 MR. SPRUNG: Okay.

12:07:04 6 MR. McKEOWN: It's not the case that there is a  
12:07:06 7 backup tape dated September 6, 2010.

12:07:08 8 MR. FREED: No, I think he said for the four days.

12:07:14 9 Isn't that the same thing you're saying; you had it  
12:07:16 10 for the five days preceding September 10?

12:07:18 11 MR. McKEOWN: There was a copy made of everything  
12:07:20 12 that would be on the backup tape taken and put into the lit  
12:07:24 13 hold.

12:07:26 14 MR. FREED: So it's not a backup tape, per se, got  
12:07:28 15 it.

12:07:28 16 MR. McKEOWN: There is confusion in the 30(b)(6)  
12:07:30 17 deposition because when you talk to an I.T. specialist, they  
12:07:34 18 only want to use the word backup tape in the context of  
12:07:38 19 disaster recovery --

12:07:38 20 THE COURT: Right.

12:07:38 21 MR. McKEOWN: -- as opposed to a copy which was made  
12:07:40 22 for purposes of everybody that's on the litigation hold for  
12:07:46 23 all their emails and My Docs.

12:07:50 24 MR. SPRUNG: And so what IP did is it made a copy of  
12:07:54 25 the exchange server?

12:07:56 1 MR. McKEOWN: I believe that's correct. I think it's  
12:07:58 2 described in some of our 30(b)(6) letters. If we had to go  
12:08:04 3 back through that, we could do that.

12:08:06 4 MR. SPRUNG: As of the date of the litigation hold.

12:08:10 5 MR. McKEOWN: September 10.

12:08:10 6 THE COURT: And how far back does it go?

12:08:12 7 MR. McKEOWN: Everything that was on the system at  
12:08:14 8 the time.

12:08:16 9 THE COURT: Good.

12:08:16 10 MR. SPRUNG: Which is -- yeah, I mean --

12:08:20 11 MR. McKEOWN: So we don't have -- unlike some  
12:08:22 12 defendants may have a December 31, 2004, tape sitting  
12:08:26 13 somewhere, we do not have that issue.

12:08:30 14 THE COURT: So is there -- and I learned this from  
12:08:32 15 reading the other defendants -- about all the other  
12:08:38 16 defendants, some people on their backup tapes have some kind  
12:08:40 17 of an index on this photograph that you took or this snapshot  
12:08:46 18 you took. Is there any way to index any of these tapes?

12:08:52 19 MR. McKEOWN: I'd have to check. I don't think so.  
12:08:54 20 I think they get processed and put into review.

12:09:00 21 MR. SPRUNG: I think, Judge, you mean not the tapes  
12:09:02 22 but this image, that the image of the exchange server that has  
12:09:08 23 been maintained --

12:09:10 24 MR. EIMER: Right.

12:09:10 25 MR. SPRUNG: -- can that be searched?

12:09:16 1 THE COURT: Searched or indexed.

12:09:16 2 MR. SPRUNG: Can you create a word index?

12:09:20 3 THE COURT: Right. Can you do that.

12:09:22 4 I think -- from what I found out from Sedona is some

12:09:26 5 of these things, you take the picture and there's nothing

12:09:28 6 there except really just the picture for disaster purposes and

12:09:34 7 does a lawsuit constitute disaster. But some of them have got

12:09:40 8 an index searching function, and others are just snapshots.

12:09:44 9 MR. McKEOWN: We can inquire.

12:09:48 10 THE COURT: Okay.

12:09:48 11 MR. McKEOWN: I have some copies of this.

12:10:02 12 This, again, was marked for outside attorneys only.

12:10:08 13 We are providing this for use.

12:10:14 14 This is one of the documents that was prepared by

12:10:18 15 International Paper for the 30(b)(6) deposition that goes

12:10:22 16 through the various computer systems and what backup exists.

12:10:28 17 MR. SPRUNG: But does this contain the My Docs

12:10:32 18 server? I think this is the transactional data.

12:10:38 19 MR. McKEOWN: Correct.

12:10:40 20 MR. SPRUNG: Which is a different animal. This is

12:10:42 21 transactional data.

12:10:44 22 THE COURT: Does that mean non-email?

12:10:46 23 MR. SPRUNG: Non-email, non-Word documents,

12:10:50 24 non-PowerPoint slides.

12:10:50 25 MR. FREED: Primarily financial.

12:10:52 1 THE COURT: Thank you. This would be like --

12:10:56 2 MR. EIMER: Sales numbers, like that.

12:10:58 3 MR. McKEOWN: And so we have provided the plaintiffs  
12:11:00 4 with a list of -- for the transactional data fields, and this  
12:11:06 5 is getting back to the backup question, the transactional data  
12:11:08 6 fields, we have provided them a list of what dates we can pull  
12:11:12 7 from what systems to fill the various fields. We are not  
12:11:18 8 going back to backup tapes. We have given them what we have  
12:11:24 9 available.

12:11:24 10 THE COURT: Okay.

12:11:26 11 MR. SPRUNG: Your question, your Honor, was whether  
12:11:28 12 -- and I think it's a great question -- when the exchange  
12:11:34 13 server was on September 10th, the date of the litigation hold,  
12:11:38 14 when the exchange server was preserved, can you create a word  
12:11:42 15 index?

12:11:44 16 MR. McKEOWN: A word index or an index?

12:11:48 17 THE COURT: Sometimes it's not a word -- some of  
12:11:52 18 them, at least from what I read, actually had an index system  
12:11:56 19 in them, which I don't know whether it would be word or date  
12:12:02 20 or category or what it would be, but that's what Jim said he  
12:12:06 21 would find out is if it is either searchable or indexable.

12:12:16 22 MR. SPRUNG: Okay. And then there also was an image  
12:12:20 23 made of another server called the My Docs server.

12:12:28 24 THE COURT: What is My Docs? My documents?

12:12:32 25 MR. SPRUNG: Yeah, it's the one that contains, right,

12:12:34 1 the employees' Word documents and other applications, other  
12:12:40 2 types of documents.

12:12:42 3 MR. FREED: Let me ask this, Jim. When they made the  
12:12:44 4 copies on September 10th, there was emails, PowerPoint,  
12:12:50 5 SharePoint, everything that was on there? That's a question.

12:12:56 6 MR. McKEOWN: You know --

12:12:58 7 MR. FREED: I am trying to get a handle on what was  
12:13:02 8 copied.

12:13:02 9 MR. McKEOWN: I know the email was copied, I know the  
12:13:04 10 My Docs was copied. You know, hundreds of hours went into  
12:13:06 11 trying to respond to these various questions in the 30(b)(6).

12:13:10 12 MR. FREED: Could you tell us, just send us a letter  
12:13:12 13 or inform us once you know for sure, or do you know for sure?

12:13:16 14 MR. McKEOWN: Sure, we can send a letter. I think  
12:13:18 15 it's already there.

12:13:20 16 MR. FREED: Yeah.

12:13:20 17 MR. McKEOWN: I don't want to misstate from my  
12:13:22 18 recollection.

12:13:22 19 THE COURT: This purpose is I am trying to take  
12:13:24 20 issues off the table.

12:13:26 21 MR. FREED: Yes. I think that's really helpful.

12:13:30 22 THE COURT: So I am trying to find out -- you  
12:13:32 23 probably don't agree with me that we are not going to backup  
12:13:34 24 tapes unless, you know -- I am sort of saying backup tapes are  
12:13:40 25 in phase two.



12:13:42 1 MR. FREED: You're saying not now.

12:13:44 2 THE COURT: What?

12:13:44 3 MR. FREED: You're saying not now. You are not  
12:13:48 4 saying we are not going to them period; you're saying we're  
12:13:50 5 not going to them now in your present --

12:13:52 6 THE COURT: Right. I mean, what I'm saying is I  
12:13:52 7 can't deal with anything more than this active data at the  
12:13:56 8 moment.

12:13:56 9 MR. FREED: You left off the word "now." I just want  
12:13:58 10 to make sure.

12:14:00 11 THE COURT: Yes.

12:14:00 12 And this is one of these things maybe we can get some  
12:14:02 13 agreement on, and then if you're going to be doing backup  
12:14:06 14 tapes, it would be in phase two, it wouldn't be right now, but  
12:14:12 15 how can people agree to it unless they know? How can you  
12:14:14 16 folks agree or at least ascend without information of what it  
12:14:20 17 is?

12:14:20 18 MR. FREED: Right.

12:14:22 19 MR. McKEOWN: But the copy that was made, for  
12:14:24 20 example, in September 2010 for the custodians for whom we have  
12:14:28 21 pulled the information, all that information was pulled into  
12:14:30 22 the process to be reviewed. I mean, it's --

12:14:34 23 THE COURT: So you're doing that already?

12:14:36 24 MR. McKEOWN: We have taken it from -- yes.

12:14:38 25 THE COURT: The backup tapes.

12:14:40 1 MR. McKEOWN: It's not the case that there is a

12:14:42 2 copy --

12:14:42 3 MR. FREED: So there is no phase two for you because  
12:14:46 4 of the way you have preserved everything.

12:14:48 5 MR. McKEOWN: Exactly.

12:14:48 6 MR. SPRUNG: And what is confusing to me is that  
12:14:50 7 there are some -- sometimes when your letters refer to copies  
12:14:54 8 made of, for example, the exchange server and sometimes refer  
12:14:58 9 to copies made for custodians only. So, you know, we have --  
12:15:06 10 we have created this list --

12:15:08 11 MR. McKEOWN: Right.

12:15:08 12 MR. SPRUNG: -- of each of these, and I am not sure  
12:15:12 13 -- in fact, the first category is what was preserved for the  
12:15:20 14 people who received lit holds, preserved for unknown number of  
12:15:22 15 employees. I am not sure that laptops and desktops and  
12:15:32 16 external drives were preserved for non-custodians, people who  
12:15:36 17 aren't in that 26 people you identified.

12:15:40 18 Exchange servers, my impression from your letters is  
12:15:46 19 that you preserved the exchange servers for all people who  
12:15:50 20 received lit holds, not just named custodians, and, in fact,  
12:15:52 21 the entire exchange server. And then, you know, I don't have  
12:16:00 22 an understanding as we go down this of what was preserved.

12:16:04 23 MR. McKEOWN: I am not sure we are going to get  
12:16:06 24 through this in the time we have left.

12:16:08 25 THE COURT: I think that should go on your to-do

12:16:10 1 list.

12:16:10 2 MR. McKEOWN: I think some of it has been attempted  
12:16:12 3 to be explained in letters, and perhaps it needs to be  
12:16:16 4 clarified.

12:16:16 5 THE COURT: Okay. That's on your to-do list.

12:16:18 6 All right. This is just a work in progress here, but  
12:16:26 7 that's kind of where we are. We will learn more about backup  
12:16:34 8 tapes.

12:16:34 9 Your 30(b)(6), you have completed your 30(b)(6), and  
12:16:38 10 there is nothing left over. I want to make sure on the  
12:16:42 11 30(b)(6), correct?

12:16:44 12 MR. SPRUNG: No, your Honor. We -- well, there's --  
12:16:46 13 we completed a 30(b)(6) and concluded it with the agreement  
12:16:52 14 that we would try to resolve some issues that we didn't  
12:16:54 15 understand through discussions like this.

12:16:56 16 THE COURT: I was just going to say. See, I think if  
12:17:00 17 there's cleanup, if two of you can do it without having to  
12:17:04 18 have a separate 30(b)(6), another 30(b)(6), you might be able  
12:17:10 19 to do it like that.

12:17:10 20 MR. McKEOWN: At the 30(b)(6), we had four witnesses  
12:17:14 21 available, and then I think around lunchtime, Mr. Sprung and I  
12:17:18 22 reached an agreement that given the charts we had provided,  
12:17:22 23 that we weren't going to bring in the last two witnesses, that  
12:17:26 24 he would study them and that we would have some informal  
12:17:32 25 exchange to try to work it out rather than try to go through

12:17:36 1 all the depositions.

12:17:36 2 THE COURT: All right. Production, IP's production.  
12:17:38 3 And I have to ask what sounds like silly questions, but I am  
12:17:42 4 trying to keep everybody straight too.

12:17:44 5 So you've done some of the production already, right?

12:17:48 6 MR. McKEOWN: We have.

12:17:48 7 THE COURT: And what is your target for -- these are  
12:17:56 8 for the custodians -- you have 26 custodians that you have  
12:18:00 9 been --

12:18:02 10 MR. McKEOWN: I think we are closer to 47 now.

12:18:04 11 THE COURT: 47. Okay.

12:18:06 12 MR. McKEOWN: But with the various individuals that  
12:18:08 13 we have added for the emails, the predecessors and the  
12:18:12 14 administrative assistants.

12:18:14 15 MR. SPRUNG: At least for some of these categories.

12:18:16 16 THE COURT: Right.

12:18:16 17 MR. McKEOWN: Correct.

12:18:18 18 THE COURT: So when -- here's what I'm trying -- the  
12:18:22 19 reason I'm asking you a range of when you're going to be, I am  
12:18:28 20 trying to figure how much review time the plaintiffs need  
12:18:36 21 before we get to my sequence of how things can happen because  
12:18:42 22 how these stupid RFPs or whatever the heck they're called is  
12:18:48 23 there wasn't any time to absorb anything. So to try to get  
12:18:56 24 your production, their first pass review, I need -- in trying  
12:19:02 25 to come up with an overall scheme here, I am trying to figure

12:19:06 1 out when you might be finished -- just a range; I am not  
12:19:10 2 talking about exact day -- and then how much time they are  
12:19:12 3 going to need to review it and say whether they need more,  
12:19:18 4 whether in certain areas they can proceed. Okay?

12:19:24 5 So what do you think?

12:19:24 6 MR. EIMER: This would be assuming we are doing it  
12:19:26 7 for the 47 custodians --

12:19:28 8 THE COURT: Yes.

12:19:28 9 MR. EIMER: -- as we have defined our search?

12:19:30 10 THE COURT: Right.

12:19:32 11 And not your privilege review, unless you're doing  
12:19:34 12 your privilege review simultaneous. Some of the people are  
12:19:38 13 doing their privilege review not at the same time.

12:19:40 14 MR. McKEOWN: I think we are a hybrid on that.

12:19:42 15 THE COURT: Okay.

12:19:42 16 MR. McKEOWN: We have produced about a month ago now  
12:19:48 17 or a little less about I think over 500,000 documents.

12:19:54 18 THE COURT: Okay.

12:19:56 19 MR. McKEOWN: It was 500,000 Bates pages.

12:20:00 20 MS. LEE: 642,000 pages.

12:20:00 21 Mr. McKEOWN: 642,00 pages. I stand corrected.

12:20:02 22 THE COURT: And you looked at every one of them. We  
12:20:04 23 give you a prize. Okay.

12:20:10 24 MR. McKEOWN: That related to the ESI for the 26  
12:20:14 25 named custodians. We had previously produced the hard copy

12:20:16 1 documents.

12:20:16 2 THE COURT: Wait, 642,000 emails?

12:20:20 3 MR. McKEOWN: Bates numbers, not email.

12:20:22 4 MS. LEE: That's the total.

12:20:24 5 MR. McKEOWN: And Bates numbers don't match up with  
12:20:26 6 pages because there are certain categories, including Excel  
12:20:30 7 files and PowerPoints, we produce in native, so they only get  
12:20:36 8 a single Bates number.

12:20:38 9 THE COURT: I get it.

12:20:38 10 MR. McKEOWN: The next production that is coming out,  
12:20:40 11 which should be coming out in a couple of weeks, I think, is  
12:20:44 12 the administrative assistants.

12:20:46 13 THE COURT: To the 26?

12:20:46 14 MR. McKEOWN: To the 26.

12:20:48 15 THE COURT: Okay.

12:20:48 16 MR. McKEOWN: There are 14 of those. I don't know if  
12:20:52 17 our new custodians we added made it in in time or not.

12:21:00 18 There's something known as the Auburn server, which  
12:21:04 19 is a server that had originally been a Weyerhaeuser server  
12:21:06 20 that had some materials there that we have processed.

12:21:10 21 THE COURT: Because you acquired Weyerhaeuser.

12:21:14 22 MR. McKEOWN: They acquired the containerboard  
12:21:18 23 business of Weyerhaeuser. Weyerhaeuser, the company, is still  
12:21:22 24 a separate independent company.

12:21:22 25 THE COURT: The board, but not the box.

12:21:24 1 MR. McKEOWN: No, board and box.

12:21:26 2 THE COURT: Board and box. Okay. Thank you.

12:21:28 3 MR. McKEOWN: Also --

12:21:30 4 THE COURT: The Auburn server would pick up the  
12:21:34 5 Weyerhaeuser.

12:21:34 6 MR. McKEOWN: Right. And I believe there's also some  
12:21:36 7 finance drive documents coming in that group.

12:21:40 8 After that, I believe the next wave will be from a  
12:21:44 9 variety of shared drives, which are shared by various  
12:21:52 10 custodians we have named. And what happens with those is once  
12:21:56 11 we have identified the relevant shared drive, we apply the  
12:22:02 12 search terms to the documents in that folder regardless of  
12:22:06 13 whether or not they were by one of the 26 custodians or they  
12:22:08 14 were written by somebody else. If they're in the folder, the  
12:22:12 15 search terms are applied to them, and then that's coming in  
12:22:14 16 the next wave.

12:22:18 17 THE COURT: Okay. You got that, Mr. Sprung? We  
12:22:30 18 don't have the Bates, but you've got a sequence.

12:22:30 19 MR. SPRUNG: Yes, I do.

12:22:32 20 MR. McKEOWN: The other thing I forgot is that's  
12:22:32 21 coming in the next wave later this month, excuse me, in June,  
12:22:36 22 is the expense reports.

12:22:38 23 MR. FREED: Did you have SharePoint? I don't  
12:22:40 24 remember. Because yesterday they had both shared drive and  
12:22:42 25 SharePoint.

12:22:42 1 MR. McKEOWN: We have shared drive and SharePoint.  
12:22:44 2 That's also in the -- shared drive, SharePoint is the final  
12:22:50 3 phase of what's currently envisioned.

12:22:52 4 MR. FREED: Okay.

12:22:54 5 THE COURT: And your privilege is somewhat  
12:22:56 6 simultaneous -- I mean review?

12:23:00 7 MR. McKEOWN: We are working on it.

12:23:02 8 THE COURT: Okay. Mr. Sprung, not to pin you because  
12:23:18 9 I'm just doing in general, so if you were to have all of that  
12:23:22 10 July on your team in Seattle, so I assume this is going to  
12:23:28 11 your team in Seattle, how long is it going to take you to put  
12:23:32 12 it on a platform, get it in, da, da, da, da, da, da, da, or  
12:23:38 13 wherever this is that happens --

12:23:40 14 MR. MOGIN: We are all on one platform, Judge.

12:23:42 15 THE COURT: You are all on one platform.

12:23:46 16 MR. SPRUNG: Yeah. So we have lawyers from different  
12:23:48 17 -- not just our firm in Seattle, but --

12:23:48 18 THE COURT: All over, yeah.

12:23:50 19 MR. SPRUNG: -- maybe a group of 10 lawyers or so  
12:23:52 20 across the country who are --

12:23:52 21 THE COURT: Going to do that.

12:23:54 22 MR. SPRUNG: -- going through this.

12:24:04 23 MR. FREED: Is Bob in charge of that? Bob will be  
12:24:08 24 here later.

12:24:08 25 THE COURT: Before our next big thing.



12:24:10 1 MR. FREED: I didn't mean to cut you off.

12:24:12 2 MR. SPRUNG: But is your question when we are going  
12:24:14 3 to get through those?

12:24:14 4 THE COURT: Yes.

12:24:16 5 MR. SPRUNG: Yeah, I would need to look at --

12:24:22 6 THE COURT: Right. So you will think about it in a  
12:24:22 7 couple weeks.

12:24:22 8 Okay. Word indexes. What was your position on my  
12:24:28 9 favorite?

12:24:32 10 MR. McKEOWN: Well, we provided one.

12:24:32 11 THE COURT: Okay.

12:24:34 12 MR. McKEOWN: I think it had over 10 million lines  
12:24:38 13 because it picks up every term, so every number, every piece  
12:24:44 14 of gobbledegook, for lack of a technical term, that's in a  
12:24:50 15 document gets picked up and identified as a term.

12:24:54 16 Ours was taken from all of the ESI to which were hit  
12:25:06 17 by the search terms and, you know, our hope was that it would  
12:25:14 18 be of use to plaintiffs to try and move this forward, and  
12:25:18 19 that's the way we produced it. But it's a very long list.

12:25:24 20 THE COURT: Okay. So you've complied. So number  
12:25:26 21 one, you have given it to them.

12:25:28 22 MR. McKEOWN: I think Mr. Mogin disagrees as to the  
12:25:34 23 scope. He would like it also for applying to all of the  
12:25:36 24 documents or the remainder of the documents that we had, not  
12:25:38 25 just those that were hit by the certain terms.

12:25:40 1 MR. MOGIN: Additionally, your Honor, I don't quite  
12:25:42 2 understand this because IP is using the same review platform  
12:25:48 3 as some of the other defendants. But both IP and  
12:25:50 4 Georgia-Pacific were unable to provide -- if you recall, PCA  
12:25:54 5 gave us three columns.

12:25:56 6 THE COURT: Hold on. I am getting my graphic out  
12:26:04 7 here.

12:26:06 8 I have it right here. Chris and I did this last  
12:26:10 9 night. Here is our sample.

12:26:12 10 MR. MOGIN: So you see there are three columns.

12:26:14 11 THE COURT: Here was our sample last night.

12:26:16 12 MR. MOGIN: And IP is only able to provide one of the  
12:26:20 13 right-hand columns, which was they can't tell us the document  
12:26:24 14 hits, they can only tell us the number of times the term was  
12:26:28 15 used in the database.

12:26:30 16 MR. McKEOWN: And I think you will find the same with  
12:26:34 17 the other defendants that used the Clearwell platform.

12:26:36 18 MR. MOGIN: Only one other defendant.

12:26:40 19 THE COURT: All right.

12:26:46 20 MR. FREED: Are those the only two that used  
12:26:48 21 Clearwell?

12:26:48 22 MR. MOGIN: No.

12:26:48 23 THE COURT: Because this is where I really needed  
12:26:52 24 education. I still don't understand this.

12:26:56 25 All right. Here is the term, second is the number of

12:27:02 1 times it was hit, this is the number of documents --

12:27:10 2 MR. MOGIN: Reverse that. So first is the number of  
12:27:12 3 documents and second --

12:27:16 4 THE COURT: This is the number of documents?

12:27:18 5 MR. MOGIN: Correct.

12:27:18 6 THE COURT: Okay. This is number of documents.

12:27:22 7 MR. MOGIN: And then the last column is number of  
12:27:24 8 hits.

12:27:26 9 THE COURT: Number of hits. And what you want on  
12:27:30 10 your wish list is words that are in the documents that got no  
12:27:40 11 hits?

12:27:42 12 MR. MOGIN: Correct.

12:27:44 13 THE COURT: Now, no one has brought to that. Okay.  
12:27:58 14 And why do you want that?

12:28:00 15 MR. MOGIN: Because it will tell me the efficiency of  
12:28:04 16 the search terms.

12:28:06 17 MR. CAMPBELL: Could you give us an example?

12:28:08 18 MR. MOGIN: Certainly. Assume for the sake of  
12:28:12 19 argument that the word "conspiracy" --

12:28:20 20 THE COURT: How about "committee." We were doing  
12:28:22 21 committee yesterday.

12:28:22 22 MR. MOGIN: Well, yesterday we did committee.

12:28:24 23 THE COURT: Right.

12:28:24 24 MR. MOGIN: All right. I would like to know if  
12:28:28 25 committee appears in the non-hit documents, and then I can

12:28:34 1 begin to unpeel the onion as to why an important word like  
12:28:38 2 committee was in the non-hit documents, and I can also begin  
12:28:42 3 to revise the search strings both for my own internal purposes  
12:28:50 4 as well as to ask defendants to run additional search strings  
12:28:52 5 based upon real live words that are in their documents. No  
12:28:58 6 guesses.

12:29:00 7 So, for example, yesterday, committee was an issue.

12:29:04 8 THE COURT: Right.

12:29:06 9 MR. MOGIN: They told you they didn't have  
12:29:08 10 committees, but using this list with the --

12:29:10 11 THE COURT: You ran it.

12:29:12 12 MR. MOGIN: We ran it and we found the word committee  
12:29:14 13 a hundred and some times.

12:29:16 14 THE COURT: Right.

12:29:16 15 MR. MOGIN: Who knows how many times committee is in  
12:29:18 16 what wasn't produced.

12:29:20 17 THE COURT: Okay.

12:29:22 18 MR. CAMPBELL: And you used the word index provided  
12:29:24 19 by them?

12:29:24 20 MR. MOGIN: Correct.

12:29:26 21 MR. CAMPBELL: So it was only the hit docs?

12:29:28 22 MR. MOGIN: Correct.

12:29:30 23 Another example -- I'm sorry, your Honor.

12:29:32 24 THE COURT: No, go ahead.

12:29:32 25 MR. MOGIN: Another example is we have been talking a

12:29:34 1 lot about organizational charts, and you will hear at the next  
12:29:38 2 hearing that GP doesn't have organizational charts. So we ran  
12:29:44 3 org chart against GP, and, lo and behold, we got hits.

12:29:48 4 Now, what would happen if we ran org chart against  
12:29:52 5 the non-hit documents in that circumstance?

12:29:54 6 THE COURT: All right. So just so IP knows what I  
12:30:00 7 sort of said yesterday is one of my goals at the end of phase  
12:30:08 8 one, I think as a real public service to future cases, not  
12:30:14 9 only here, but people who are trying to do a mediation or more  
12:30:20 10 than work, is some kind of testing the efficacy of the process  
12:30:26 11 that you did. That's what we have been talking about all the  
12:30:32 12 way along.

12:30:34 13 One of the reasons I have been interested in this  
12:30:36 14 fourth column is --

12:30:38 15 MR. McKEOWN: I'm sorry, what's the fourth column,  
12:30:40 16 your Honor?

12:30:40 17 THE COURT: Words that are in the document that got  
12:30:44 18 no number of hits.

12:30:46 19 If in the end that could be our verification. Okay?  
12:30:52 20 I am exploring different ways to verify, what would be the  
12:30:58 21 simplest, cheapest, fairest way to be able to verify the  
12:31:06 22 search. That was your homework for the next --

12:31:08 23 MR. McKEOWN: For the 19th.

12:31:12 24 THE COURT: -- status. For the 19th.

12:31:12 25 So one of the things I have been doing trying to

12:31:14 1 understand this is looking at this as maybe not just we are  
12:31:18 2 going to give something else right now, but could this  
12:31:22 3 possibly be our potential verification? And we are going to  
12:31:26 4 hear from everybody on it. And I didn't understand -- I still  
12:31:30 5 haven't completely understood what it was. This helped; this  
12:31:34 6 visual helped when I could see that.

12:31:38 7 Okay. So you've provided your word index.

12:31:46 8 MR. MOGIN: Sort of.

12:31:46 9 THE COURT: Sort of. Sort of, sort of, sort of.

12:31:50 10 MR. MOGIN: They are still missing a column whether  
12:31:52 11 they get to non-hits or not.

12:31:54 12 MR. McKEOWN: And, again, we asked Clearwell if we  
12:31:56 13 could do it, and --

12:31:58 14 THE COURT: And they said no.

12:31:58 15 MR. McKEOWN: -- they said they could not. We tried.  
12:32:00 16 We took this up to higher levels of Clearwell to try and get  
12:32:06 17 this done.

12:32:06 18 THE COURT: All right. Are you the person who had --  
12:32:08 19 who had the self-selection problem? I ran across this  
12:32:16 20 self-selection, and I don't understand what self-selection is,  
12:32:20 21 and it may not be you.

12:32:24 22 MR. SPRUNG: Your Honor, we did raise a  
12:32:28 23 self-selection issue.

12:32:30 24 THE COURT: With IP?

12:32:30 25 MR. SPRUNG: With IP. And IP has clarified the way

12:32:38 1 that they collected, particularly with shared drives and  
12:32:42 2 SharePoint sites, that for those two eliminated the concern of  
12:32:50 3 self-selection.

12:32:52 4 THE COURT: All right.

12:32:52 5 MR. SPRUNG: And, I apologize, I haven't gone back  
12:32:56 6 and looked at each of the categories that we had originally  
12:33:00 7 identified and checked if they mollified our concerns with  
12:33:10 8 regard to each of those. So we still have a little work to do  
12:33:12 9 on that.

12:33:12 10 THE COURT: But you can talk about it?

12:33:14 11 MR. SPRUNG: Yes.

12:33:14 12 THE COURT: I didn't even know what self-selection  
12:33:16 13 meant.

12:33:32 14 MR. McKEOWN: Your Honor, will we also have a chance  
12:33:34 15 today to talk about the domestic mills?

12:33:36 16 THE COURT: Yes -- well, do you think that's a better  
12:33:38 17 thing to do here, or do you think that should be -- do you  
12:33:44 18 think we need Temple here to do it with you, and would that  
12:33:50 19 be -- I am happy to talk about it. I didn't even know --  
12:33:56 20 nobody said anything.

12:33:58 21 Temple mentioned yesterday that you were going  
12:34:02 22 through a process, but we didn't get into any detail.

12:34:06 23 MR. McKEOWN: I am also happy to try to deal with it  
12:34:08 24 in a separate session with Mr. Sprung or Mr. Mogin.

12:34:12 25 THE COURT: But with Mr. Mogin -- maybe we should at

12:34:16 1 least talk about it while Mr. Freed and Mr Mogin --

12:34:18 2 MR. FREED: He did reach out to us maybe three weeks  
12:34:20 3 ago, but I don't think it was on the agenda.

12:34:22 4 THE COURT: What is this deadline? What is this  
12:34:24 5 deadline coming up? We should know about this. You said  
12:34:28 6 Justice Department?

12:34:28 7 MR. McKEOWN: I think it's around the end of the  
12:34:30 8 month, but I am not sure.

12:34:32 9 MS. BULA: June.

12:34:34 10 MR. McKEOWN: June, not the end of May.

12:34:36 11 THE COURT: So what's Justice doing and what are you  
12:34:40 12 doing?

12:34:40 13 MR. McKEOWN: What is being done is that three mills,  
12:34:48 14 two that were previously Temple-Inland mills and one which was  
12:34:54 15 International Paper mill, are being divested, sold to  
12:34:58 16 purchasers. We made a proposal about for preservation  
12:35:06 17 purposes that we would preserve all the documents for the mill  
12:35:08 18 managers and that we have -- in terms of what we provided in  
12:35:14 19 our fields for the transactional data fields, we have  
12:35:16 20 centralized data for those mills that we have for  
12:35:20 21 International Paper that Temple-Inland, I guess we would need  
12:35:24 22 to talk to Temple-Inland about their transactional data. But  
12:35:28 23 what we wanted to just get on the table and have decided  
12:35:32 24 before the mills are sold to a third party and we don't  
12:35:36 25 control them anymore is if there is a disagreement about what



12:35:38 1 we need to preserve, we'd like to work that out.

12:35:42 2 MR. FREED: In preparation for the meeting today,  
12:35:44 3 Jeff Sprung has actually put together some very preliminary  
12:35:48 4 observations extensively --

12:35:50 5 THE COURT: On this topic?

12:35:50 6 MR. FREED: Yes. Extensively preliminary.

12:35:54 7 So Dan and I really haven't had a chance to talk  
12:35:56 8 about it. I think it might be more productive to do it  
12:36:00 9 outside of today's session.

12:36:00 10 MR. McKEOWN: That's fine.

12:36:02 11 If we reach -- if we can't reach agreement, it may be  
12:36:08 12 the case, your Honor, that we are going to be coming to you --

12:36:10 13 THE COURT: With a motion and some kind of order.

12:36:12 14 MR. McKEOWN: -- with a motion on some type of  
12:36:14 15 expedited basis.

12:36:16 16 MR. FREED: We understand.

12:36:18 17 THE COURT: Well, if it's an agreed order, that's not  
12:36:20 18 a problem at all.

12:36:24 19 MR. FREED: We have had similar issues because this  
12:36:28 20 is an industry which is consistently integrated, so this is  
12:36:30 21 not the first time we have run across this request. I think  
12:36:34 22 we should be able to work this out.

12:36:34 23 MR. McKEOWN: And there was an agreement a couple of  
12:36:36 24 years ago, I think, before I was involved in the case with  
12:36:38 25 respect to some plants that were closing and what was done.

12:36:42 1 THE COURT: Okay.

12:36:42 2 MR. McKEOWN: And that's why we just --

12:36:44 3 MR. FREED: And we had some issues.

12:36:48 4 MR. McKEOWN: Yeah, I wasn't involved in that.

12:36:50 5 MR. FREED: No, I'm saying this isn't the first time  
12:36:52 6 we've had this happen. It's just that we understood the  
12:36:52 7 importance of it. We have had a lot on our plate as well, and  
12:36:58 8 this is really -- will help us get there.

12:37:00 9 MR. SPRUNG: One question. Are all of the mill  
12:37:04 10 managers and assistant mill managers, are their emails all at  
12:37:12 11 the -- on the exchange server in Levelland?

12:37:18 12 THE COURT: Texas?

12:37:20 13 MR. SPRUNG: No, it's not Levelland.

12:37:22 14 MS. BULA: Memphis.

12:37:24 15 By way of clarification, I don't think there are  
12:37:26 16 assistant mill managers, just to get that off the table.

12:37:28 17 MR. SPRUNG: Okay.

12:37:30 18 MS. BULA: Some of these mills --

12:37:32 19 MR. SPRUNG: People in charge of areas other than --  
12:37:34 20 I mean, there are production people. We looked at the org  
12:37:38 21 chart.

12:37:38 22 MS. BULA: The answer to your question would be no  
12:37:40 23 because two of these mills are Temple mills, one of them is an  
12:37:44 24 International Paper mill.

12:37:46 25 MR. McKEOWN: That's true.

12:37:46 1 MS. BULA: Correct.

12:37:48 2 MR. McKEOWN: But that's why perhaps we are going to  
12:37:50 3 have to talk to Mr. Marovitz and Mr. Miller as well.

12:37:56 4 MR. FREED: Andy at least I don't think has brought  
12:37:58 5 that up with us independent of your communication.

12:38:04 6 MS. BULA: That's because they are now International  
12:38:06 7 Paper mills.

12:38:06 8 MR. FREED: No, I understand. Maybe I didn't say  
12:38:10 9 that right.

12:38:12 10 At least talk to Mr. Marovitz, which impacts this  
12:38:14 11 discussion, and I'm not sure that's been --

12:38:16 12 MR. McKEOWN: Why don't we try to set a call with the  
12:38:18 13 three of us, and we can talk about it. I wanted to tee it up  
12:38:22 14 as a timing issue --

12:38:24 15 THE COURT: No, I am glad.

12:38:24 16 MR. McKEOWN: -- just in case your Honor was going on  
12:38:26 17 vacation for the last two weeks in June.

12:38:28 18 THE COURT: Very good point. I am going to Door  
12:38:32 19 County, I am going to Mayor Jim's house, or close, for the 4th  
12:38:38 20 of July. So I am here until the 30th. Otherwise, you come to  
12:38:44 21 Door County and I will sign it up there.

12:38:48 22 MR. EIMER: Very good.

12:38:48 23 THE COURT: It's a local thing.

12:38:50 24 MR. MOGIN: I got that.

12:38:52 25 MR. FREED: Not that local.

12:38:54 1 THE COURT: Very local.

12:38:56 2 MR. McKEOWN: Less local for Chicago.

12:39:02 3 MR. SPRUNG: But for the mill that is the IP mill,  
12:39:08 4 all of those employees who are at that mill, their emails go  
12:39:10 5 through the exchange server?

12:39:12 6 MS. BULA: Correct.

12:39:14 7 MR. MOGIN: Is the same true for box plants?

12:39:16 8 MS. LEE: All emails for International Paper, as far  
12:39:20 9 as I understand, go through exchange. They are not separated  
12:39:22 10 or located separately.

12:39:32 11 THE COURT: Okay. So that's to talk about, and we  
12:39:34 12 will get a report at the general meeting.

12:39:40 13 MR. FREED: Hopefully the report will be it's not an  
12:39:42 14 issue.

12:39:42 15 THE COURT: Right.

12:39:46 16 What else, Mr. McKeown, did you have down on your  
12:39:48 17 agenda?

12:39:48 18 MR. McKEOWN: Well, since we are not going to  
12:39:50 19 apparently resolve all issues this afternoon, that was the end  
12:39:54 20 of my list for today.

12:39:56 21 THE COURT: Well, on the RPDs, this is my work in  
12:40:00 22 progress. I am trying to figure this out. But did you answer  
12:40:06 23 -- even if Mr. Mogin doesn't agree with the completeness of  
12:40:10 24 your answer, did you answer every one of them, or were there  
12:40:16 25 any that you didn't answer at all, like GP?

12:40:22 1 MR. McKEOWN: I'd have to go back. I suspect there  
12:40:26 2 were probably a few requests for production to which there was  
12:40:30 3 an objection but not an agreement to produce certain  
12:40:34 4 categories of documents.

12:40:36 5 THE COURT: There were. There were a few, okay.

12:40:42 6 I didn't really see that in Temple, but I may have  
12:40:48 7 been mistaken about Temple. It's a very -- I just want to say  
12:41:02 8 Mr. Mogin sent me some cases last night on parsing and on  
12:41:16 9 judges' takes on the requests to produce documents.

12:41:20 10 What I said yesterday, just so you hear it right from  
12:41:24 11 the horse's mouth, is that procedurally in the 14 years, what  
12:41:30 12 I have seen happen is if someone received what they considered  
12:41:34 13 to be an overly-broad request to produce documents, they come  
12:41:38 14 before me and ask for a motion for protective order.

12:41:44 15 Conversely, the requesting party comes within the 30  
12:41:48 16 days for a request -- a motion to compel. So this is not any  
12:41:54 17 blame to anybody here. I think we have a procedural sticky  
12:42:00 18 wicket since nobody came to Judge Shadur within the one-year  
12:42:06 19 period of time.

12:42:06 20 MR. FREED: You know, I was reflecting on that, your  
12:42:10 21 Honor, and what happened, as I recall, is we actually  
12:42:12 22 suggested at one of the last status conferences that we had  
12:42:16 23 reached impasse at certain issues and might be bringing  
12:42:18 24 motions to compel.

12:42:20 25 THE COURT: Right.

12:42:22 1 MR. FREED: And that sort of got subsumed when the  
12:42:24 2 ESI issues --

12:42:24 3 THE COURT: Took over.

12:42:26 4 MR. FREED: Yes.

12:42:30 5 THE COURT: But the reason I'm saying is it's not  
12:42:32 6 blame is that all the cases that Mr. Mogin sent me last night  
12:42:38 7 are in a motion to compel or motion for protective order, and  
12:42:44 8 they're stressing the 30 days, they're stressing everything,  
12:42:48 9 and here we are a year later.

12:42:50 10 So legally we have -- we could have -- if you had  
12:42:54 11 somebody else, you could have a legal challenge. I am looking  
12:42:58 12 at this as another way to negotiate a sort of very complicated  
12:43:08 13 issue and I haven't gotten too much further than that on  
12:43:14 14 either the propriety, what are we going to do about it, and  
12:43:18 15 that's going to go down on your list of to-do things for the  
12:43:22 16 next conference is going to be your suggestion on what do we  
12:43:30 17 do about this for now. And you're going to get -- from Chris  
12:43:34 18 you are going to get an email, and anybody have any great  
12:43:38 19 ideas on how to solve this dilemma because it's a mutual  
12:43:44 20 dilemma.

12:43:46 21 MR. FREED: I was actually agreeing with you and  
12:43:48 22 saying how I think we got to the posture.

12:43:52 23 THE COURT: Right.

12:43:52 24 MR. EIMER: I guess I have a little different take on  
12:43:54 25 this because as I read those cases, they were directed towards

12:43:56 1 general objections that were made by the defendants that were  
12:44:00 2 blanket which for almost -- I think entirely, except for a  
12:44:06 3 couple, don't exist here.

12:44:06 4 THE COURT: Right.

12:44:08 5 MR. EIMER: And so I think -- I thought more  
12:44:10 6 traditionally in this district, if it's a plaintiff serving  
12:44:14 7 the document request and that defendant objects, put in the  
12:44:18 8 specificity that the court requires, that's different in  
12:44:22 9 different courts. I understand that.

12:44:22 10 But I think putting aside the general objections that  
12:44:26 11 were -- the cases criticize, there were very specific  
12:44:28 12 objections to almost all, if not all, of the requests and then  
12:44:32 13 a description of what was going to be produced, to me, the  
12:44:36 14 burden then shifts to the plaintiff. They want to enforce  
12:44:38 15 their document request beyond what's agreed to, that's their  
12:44:42 16 burden, not ours.

12:44:42 17 THE COURT: And that's why I am saying I don't even  
12:44:46 18 know -- but Judge Barker, you know, was sort of accusing  
12:44:54 19 Mr. Mogin of making up the word parsing. Actually, "parsing"  
12:44:58 20 is in that case.

12:44:58 21 MR. EIMER: It is in that case.

12:45:00 22 THE COURT: And you know what she had to say about  
12:45:02 23 it. She says, How dare you, you are not the judge and jury of  
12:45:06 24 this.

12:45:06 25 Now, do I agree with Judge -- I mean, that's why I'm

12:45:10 1 saying we are going to have to stand back, take three deep  
12:45:16 2 breaths, what it is is it's a need on the part of the  
12:45:20 3 plaintiffs to get some documents. And I don't want to get  
12:45:30 4 into a hyper-technical argument here --

12:45:34 5 MR. EIMER: Right.

12:45:34 6 THE COURT: -- because I think -- these cases also,  
12:45:40 7 Mr. Mogin, were, you know, single plaintiff cases. I actually  
12:45:46 8 could not get -- my head was spinning last night, how anybody  
12:45:52 9 in 30 days or, in your case, 90 days following Judge Shadur's  
12:45:58 10 denial of the motion to dismiss, logically, how anybody could  
12:46:02 11 ever be prepared to answer anything like that. I mean, it's  
12:46:06 12 just -- it just is impossible in a complex, big case like  
12:46:12 13 this. And it sent me to the Southern District of New York's  
12:46:18 14 new order.

12:46:22 15 You know, you probably know -- it doesn't really help  
12:46:24 16 this -- I mean, I will tell you, I checked it at 7:00 o'clock  
12:46:28 17 this morning. But unlike our pilot program for e-discovery,  
12:46:34 18 they have just started, Judge Scheindlin just started a  
12:46:38 19 special plan for complex cases because complex cases don't fit  
12:46:44 20 into the dum-dum rules for you will do this and you will do  
12:46:50 21 this and you will do this. You've got to have like special  
12:46:54 22 rules for these cases. Because I was thinking even if  
12:46:56 23 everybody did everything perfectly, how could they know before  
12:47:02 24 they even started collecting the materials? If we were going  
12:47:06 25 along with Rule 34 and 30 days, it would be impossible to do



12:47:12 1 that. The whole thing was like a setup for failure.

12:47:16 2 MR. EIMER: Right.

12:47:18 3 MR. MOGIN: It wasn't a negotiated response date,  
12:47:20 4 your Honor.

12:47:20 5 THE COURT: Well, I know, but, I mean, it's just a  
12:47:26 6 new world out there --

12:47:26 7 MR. EIMER: Right.

12:47:28 8 THE COURT: -- is what I am saying. It really is a  
12:47:30 9 new world out there, and how are we all going to be fair and  
12:47:34 10 just in this new world.

12:47:36 11 MR. EIMER: Well, that's -- and I think your Honor is  
12:47:40 12 exactly on the right track with that because there is  
12:47:42 13 something that could be manifestly unfair to this if it plays  
12:47:46 14 out in a certain way to us -- and, again, this is our  
12:47:50 15 perception -- but our perception is we were very clear as to  
12:47:54 16 the objections we were making and the documents we had agreed  
12:47:56 17 to produce. And we are clear with the plaintiffs that we  
12:47:58 18 would be getting this enormous machine, we started up this  
12:48:02 19 engine that's now cost over \$4 million to produce. And  
12:48:06 20 certainly they watched us produce, welcomed the documents,  
12:48:10 21 asked for documents, needed the documents, and we did that.

12:48:14 22 If we have to start all over again and re-review the  
12:48:18 23 thousands and thousands of documents that have been put aside  
12:48:20 24 as not responsive because now the requests got broadened  
12:48:26 25 somehow, we have wasted millions of dollars.

12:48:28 1 THE COURT: But I said to Andy -- to Mr. Marovitz  
12:48:32 2 yesterday, I don't think you have -- I mean, they sort of said  
12:48:36 3 that, not on this request to produce stuff, because I don't  
12:48:40 4 think you've wasted anything because I think you would have  
12:48:42 5 needed to do that to even know as much as you know right now.  
12:48:46 6 I mean, I think there's kind of a self-education that goes on  
12:48:50 7 in a case.

12:48:50 8 MR. EIMER: No, there's some of that, and there is no  
12:48:52 9 question that some of this would be more efficient going  
12:48:56 10 forward.

12:48:56 11 THE COURT: Right.

12:48:56 12 MR. EIMER: But a huge quantity of documents have  
12:48:58 13 been reviewed and determined to be not responsive.

12:49:02 14 THE COURT: Right.

12:49:02 15 MR. EIMER: All of those now have to be brought back  
12:49:04 16 up again and re-reviewed a second time, and that will cost  
12:49:08 17 millions of dollars, it will, to do that a second time, your  
12:49:10 18 Honor.

12:49:10 19 THE COURT: If you were required to do it.

12:49:12 20 MR. EIMER: If we were required to do that, and  
12:49:14 21 that's our concern. That's our worry in this.

12:49:16 22 THE COURT: That's why I am saying I have to -- after  
12:49:18 23 yesterday, it was kind of a big mishmosh on our discussion  
12:49:22 24 about it.

12:49:22 25 But I am just saying to you I am going to have to ask

12:49:26 1 your input on -- all of your input on a plan to get ourselves  
12:49:32 2 out of this bunker.

12:49:34 3 MR. EIMER: Right. We appreciate that.

12:49:38 4 MR. FREED: Your Honor, I don't know if -- I would  
12:49:40 5 like to say I understand what Mr. Eimer is saying. I really  
12:49:44 6 do. But I also want to point out, and I think you would  
12:49:46 7 concur, that from the earliest conception of the process, we  
12:49:50 8 had a different idea about how the search should be done, and  
12:49:52 9 we were looking at predictive coding. And we told them  
12:49:56 10 consistently, we have letter after letter, saying we want to  
12:49:58 11 be part of the process, we felt we were excluded from the  
12:50:02 12 process, and that if as a result of that it was necessary for  
12:50:06 13 them to make more production, we wanted to put them on notice  
12:50:08 14 that we would expect them to do that.

12:50:12 15 So I understand what he is saying, we are where we  
12:50:14 16 are, but we tried to at the very earliest possible time alert  
12:50:18 17 them that we didn't want to be met with that argument.

12:50:20 18 THE COURT: Right. Well, this airing is good. These  
12:50:24 19 guys have been very gracious. They got their big issue taken  
12:50:28 20 away from them by this little pushy judge very quickly without  
12:50:32 21 even a formal opinion, and I think you've been -- I mean, at  
12:50:38 22 least I know this anyway. I know that.

12:50:42 23 And I'm telling you, when Chris and I looked at two  
12:50:46 24 of our many dysfunctional cases that are from '08 and '09 and  
12:50:50 25 they haven't finished fact discovery and it's a single

12:50:54 1 plaintiff and a single defendant, I am amazed at what you have  
12:51:00 2 done in one year.

12:51:00 3 MR. EIMER: It's good not to be in the category of  
12:51:04 4 dysfunctional.

12:51:06 5 MR. SPRUNG: Not yet.

12:51:08 6 MR. EIMER: Not yet.

12:51:08 7 MR. MOGIN: Your Honor, that's interesting. We were  
12:51:10 8 having a similar discussion, and we didn't come out the same  
12:51:12 9 way. This was just between ourselves.

12:51:14 10 THE COURT: Maybe things are different in San Diego.  
12:51:18 11 I know they are in the Southern District of New York. I know  
12:51:22 12 things are much more of a rocket docket there, but I am too  
12:51:28 13 old for that.

12:51:28 14 Okay. Thank you all --

12:51:30 15 MR. EIMER: Thank you, Judge.

12:51:30 16 MR. McKEOWN: Thank you, your Honor. I appreciate  
12:51:32 17 your time.

12:51:32 18 THE COURT: -- for your very hard work. You have an  
12:51:36 19 office to meet this afternoon?

12:51:38 20 MR. McKEOWN: We do. We are going to our offices.

12:51:40 21 MR. MOGIN: Your Honor, before we break very quickly?  
12:51:42 22 Since the subject of what's at issue in the complaint, et  
12:51:46 23 cetera, has come up, I did pull up Judge Shadur's order, and  
12:51:48 24 if you wanted to review it over the break --

12:51:50 25 THE COURT: Good.

12:51:52 1 MR. MOGIN: -- pages 6 through 12 --

12:51:54 2 THE COURT: Good.

12:51:54 3 MR. MOGIN: -- and then 22 and 23 would be the most  
12:52:02 4 important points.

12:52:02 5 THE COURT: 22 and 23. Thank you.

12:52:02 6 MR. MOGIN: And 22 and 23 is the specific discussion  
12:52:06 7 about boxes.

12:52:06 8 THE COURT: Okay. Good mediator that I am, we are  
12:52:10 9 going to summarize this kind of quickly, I think the two of  
12:52:12 10 you have been taking good notes, but -- so that people know  
12:52:16 11 what they have committed to talk about.

12:52:18 12 MR. EIMER: Right.

12:52:18 13 THE COURT: That's all I am talking about.

12:52:20 14 So defendants are going to get back to you and  
12:52:26 15 discuss naming litigation holds, names on the litigation  
12:52:32 16 holds, not the content, and its name and title. And what did  
12:52:36 17 you say -- did you say something on when they were --

12:52:38 18 MR. SPRUNG: Date.

12:52:40 19 THE COURT: Date when they were -- if they're still  
12:52:42 20 there and you don't care, it's if they're gone?

12:52:46 21 MR. SPRUNG: The date is important to us because if  
12:52:48 22 the litigation hold was placed, let's say, six months after  
12:52:52 23 the case was filed, then we would know that the witness had an  
12:52:56 24 opportunity to destroy documents.

12:53:00 25 MR. EIMER: The date is the date that they were

12:53:00 1 notified? Is that the date you are talking about?

12:53:04 2 MR. SPRUNG: The date that they received the  
12:53:06 3 litigation hold.

12:53:06 4 THE COURT: Okay. Got it. So you're going to  
12:53:10 5 discuss that.

12:53:10 6 You are going to discuss the Justice Department.

12:53:20 7 Jim is getting back to you on information regarding  
12:53:24 8 indexability of backup tapes.

12:53:30 9 Plaintiffs are getting back to you regarding your  
12:53:34 10 suggestion on the two plants, the sampling of the two plants.

12:53:50 11 MR. CAMPBELL: And that was four people, correct, two  
12:53:54 12 managers, two sales.

12:53:54 13 MR. FREED: Box and containerboard.

12:53:58 14 MR. McKEOWN: Correct.

12:54:00 15 MR. EIMER: It's actually eight people.

12:54:00 16 MR. McKEOWN: Eight people.

12:54:04 17 MR. CAMPBELL: Thank you.

12:54:20 18 THE COURT: Let me ask you something. Here is  
12:54:22 19 something I want to talk about too, just for the heck of it.  
12:54:26 20 I'm doing a little informal polling here on this fourth  
12:54:28 21 column.

12:54:28 22 MR. EIMER: Okay.

12:54:30 23 THE COURT: If you would consider doing Mogin's  
12:54:32 24 fourth column, we'll call it.

12:54:34 25 MR. EIMER: This would be indexing the words, the

12:54:38 1 word index for the null set.

12:54:44 2 THE COURT: Basically, right.

12:54:44 3 MR. MOGIN: Would that be the title of a horror  
12:54:46 4 movie, your Honor, Mogin's Fourth Column?

12:54:50 5 THE COURT: It is. It is. Said very affectionately,  
12:54:54 6 Mr. Mogin.

12:54:56 7 We have decided that -- I said last night there was  
12:54:58 8 another one, there was another one of your words in here, a  
12:55:00 9 map index. Not only was there a word index, then there was a  
12:55:04 10 map index.

12:55:06 11 MR. CAMPBELL: Category index.

12:55:08 12 THE COURT: Category index, yes. We found that too.  
12:55:10 13 We decided you are a frustrated writer, honest to God, who  
12:55:14 14 just is like dressed as a lawyer here. I have no idea what  
12:55:20 15 the category index was or the map index or any of them.

12:55:26 16 Just tell me what your take is on this. Since I  
12:55:34 17 didn't know what it was, I don't know how hard it is to do.

12:55:36 18 MR. FREED: On the to-do list, I shouldn't even say  
12:55:38 19 this because the burden is on us, but I think you also wanted  
12:55:42 20 us to try to give you an estimate of when we would complete a  
12:55:44 21 review of the documents, but that was for later.

12:55:46 22 THE COURT: Yes, right.

12:55:46 23 Well, that's for the next --

12:55:48 24 MR. FREED: Right.

12:55:48 25 THE COURT: I mean, to give me an idea if we are

12:55:50 1 talking about phase one.

12:55:52 2 MR. FREED: Right. Right.

12:55:54 3 THE COURT: Yesterday's folks were in agreement too.

12:55:58 4 I forgot to tell you this. It was another informal poll, do

12:56:04 5 you think you wanted bifurcated class discovery, and nobody

12:56:06 6 wanted bifurcated class discovery.

12:56:08 7 MR. McKEOWN: I would have to think about that,

12:56:10 8 although I think the growing trend is not to bifurcate.

12:56:14 9 THE COURT: Right. Right. And it's going to be up

12:56:16 10 to Judge Shadur anyway, but I am trying to get a plan to Judge

12:56:22 11 Shadur. That's a goal, okay?

12:56:24 12 I assured everyone yesterday that with my demise come

12:56:32 13 September 30th, with my pending demise here, that our two new

12:56:38 14 magistrate judges will be picked on June 29th, I am positive,

12:56:42 15 because I am clairvoyant on top of everything else, that you

12:56:46 16 are going to have two perfect civil litigators who are going

12:56:52 17 to understand what this is about, and they probably will be on

12:56:56 18 board October 1st.

12:57:00 19 My two law clerks also happen to be applying to these

12:57:02 20 two magistrate judges, so you very well may have either Chris

12:57:06 21 or Margaret.

12:57:08 22 MR. EIMER: So it will be assigned to one of the two

12:57:10 23 new magistrate judges?

12:57:10 24 THE COURT: Uh-huh. It's not going back to the whole

12:57:12 25 group.



12:57:12 1 MR. EIMER: That's what I mean.

12:57:14 2 THE COURT: And we will know by the end of June who  
12:57:16 3 they are. And because I am so clairvoyant, they are both  
12:57:22 4 brilliant.

12:57:24 5 MR. MOGIN: Your Honor, is that an automatic process  
12:57:26 6 or something Judge Shadur is involved with?

12:57:28 7 THE COURT: With what?

12:57:30 8 MR. MOGIN: The reassignment.

12:57:32 9 MR. FREED: To the new magistrate judge.

12:57:34 10 THE COURT: No, he is not involved in it unless he  
12:57:36 11 were to take it back. But, I mean, after those comments -- I  
12:57:40 12 think Nan knows a lot more about that. I don't think Milt has  
12:57:44 13 ever said anybody knows more about anything than he does.

12:57:48 14 MR. MOGIN: Well, that's the point, that he was quite  
12:57:50 15 specific that he had comfort sending it to you.

12:57:52 16 THE COURT: Yes. But I think he will -- I mean and  
12:57:54 17 particularly if you ask that it stay with the new magistrate  
12:58:00 18 judge.

12:58:00 19 MR. SPRUNG: Are there two -- did you cover, Judge  
12:58:04 20 Nolan, the issue of getting -- we need to get clarification on  
12:58:12 21 where there were images made on the date of the litigation  
12:58:22 22 hold --

12:58:22 23 MR. FREED: The scope of the copy.

12:58:24 24 MR. SPRUNG: -- what was preserved. And you had said  
12:58:26 25 indexability and backup tapes, and I think maybe that --

12:58:32 1 THE COURT: Well, they are looking to see if it's  
12:58:34 2 either searchable, indexable, I am calling it. That's not a  
12:58:44 3 word.

12:58:44 4 MR. SPRUNG: And then we also want to know what was  
12:58:46 5 preserved for -- because it's unclear to us what was preserved  
12:58:50 6 for the 26 named custodians, what was preserved for the people  
12:58:54 7 on the lit hold, which is a much -- 500 people, apparently,  
12:59:02 8 and what was preserved in total. It sounds like the exchange  
12:59:08 9 server may have been preserved in total.

12:59:10 10 MR. EIMER: When you say what was preserved, you want  
12:59:10 11 to know what we took a snapshot of?

12:59:12 12 THE COURT: Yes.

12:59:16 13 MR. SPRUNG: That's what you're asking.

12:59:16 14 THE COURT: Yes. So you're just giving me  
12:59:18 15 information. That's all.

12:59:18 16 MR. FREED: And then just a list of everything else.

12:59:20 17 THE COURT: Sure.

12:59:24 18 MR. FREED: I forgot to mention that.

12:59:26 19 MR. MOGIN: We are the fourth column.

12:59:28 20 THE COURT: That's the fifth column.

12:59:30 21 MR. SPRUNG: And then we were going to have some  
12:59:32 22 discussion about org charts and whether we've got all the --

12:59:38 23 THE COURT: Hopefully, you're going to look at that  
12:59:40 24 this afternoon.

12:59:40 25 MR. FREED: About what org chart he might belong to?

12:59:40 1 Maybe I'm missing --

12:59:46 2 THE COURT: He thinks he gave everything.

12:59:48 3 MR. McKEOWN: We are checking on some -- we can talk  
12:59:52 4 about some of that this afternoon.

12:59:54 5 THE COURT: You're welcome to come any time. I love  
12:59:58 6 -- on our committee, on our e-discovery committee, we have a  
01:00:00 7 number of clients, as we call you, clients, in-house people  
01:00:06 8 who we never -- at least the court very, very rarely gets the  
01:00:10 9 input from anybody, so you are welcome to come anytime you  
01:00:14 10 want.

01:00:14 11 MS. BULA: Thank you.

01:00:14 12 THE COURT: Thank you for traveling.

01:00:18 13 MR. FREED: You should invite her for June 14th.

01:00:20 14 THE COURT: I did, but I'm sure you have better  
01:00:22 15 things to do than come sit around.

01:00:28 16 And thank you for coming. We are very glad you came  
01:00:32 17 too.

01:00:34 18 MR. EIMER: Thank you, your Honor.

01:00:36 19 MR. MOGIN: Thank you, your Honor.

01:00:36 20 MR. McKEOWN: Thank you, your Honor.

01:00:40 21 MS. BULA: Thank you so much.

01:00:44 22 MS. LEE: Thank you.

23 (Which were all the proceedings had in the above-entitled  
24 cause on the day and date aforesaid.)

25

1 I certify that the foregoing is a correct transcript from  
2 the record of proceedings in the above-entitled matter.

3 \_\_\_\_\_  
4 Carolyn R. Cox  
5 Official Court Reporter  
6 Northern District of Illinois

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Date

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/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR